Supreme Court of the United States

OCTOBER TERM, 1966

No. 254

THEODORE STOVALL, PETITIONER

vs.

WILFRED DENNO, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civ. 1505

[File Endorsement Omitted]

THE UNITED STATES OF AMERICA, EX REL., THEODORE R. STOVALL, RELATOR

-against-

WILFRED L. DENNO, Warden, Sing Sing Prison, County of Westchester, State of New York, RESPONDENT

28 U.S.C. 2241

APPLICATION FOR A WRIT OF HABEAS CORPUS—filed May 14, 1964

The application of Theodore R. Stovall, for a writ of habeas corpus respectfully shows to this Court and alleges:

FIRST: That, he is the relator, Theodore R. Stovall, the person on whose behalf this application is made, and that he is imprisoned, restrained and detained of his liberty at the Sing Sing Prison, County of Westchester, and that the person by whom he is so imprisoned, restrained and detained is Wilfred L. Denno, as Warden of the Sing Sing State Prison.

SECOND: That, the cause or pretense of the cause of the imprisonment, detention and restraint is a certain commitment issued by the County Court of Nassau County, based upon an indictment charging him with the crime of murder in the first degree, and two counts of attempted murder in the first degree.

THIRD: That, the relator is unjustly and illegally threatened with the forfeiture of his life sometime during the

week of *June 8, 1964*, by the above named Warden of Sing Sing Prison as agent of the people of the state of New York.

FOURTH: That, relator has not been committed and is not legally detained by virtue of any final judgment or decree, or any final order, mandate or process, and this application is filed and submitted pursuant to *Title 28, Section 2241 of the United States Code.*

FIFTH: That, the restraint, imprisonment and detention of the relator are illegal in that it violates the *4th, 5th* and *14th Amendment to the Constitution of the United States of America.*

[fol. 2] That, the facts upon which this claim is based are as follows:

Heretofore, on the 1st day of August, 1961, relator was indicted by the Grand Jury of Nassau County charging him with murder and attempted murder in the first degree. On the 1st day of September, 1961, he was duly assigned and did request assignment of counsel. That court entered a plea of Not Guilty, and counsel was thereafter assigned to conduct his defense.

Thereafter, a trial under this indictment was had before County Court Judge Paul Kelly, and a jury; which resulted in a verdict of Guilty of felony murder-no recommendation; Guilty of second degree murder; Guilty of attempted murder, and on the 6th day of September, 1962, a sentence of death was imposed.

> Relator has no copy of the Certified Record of his trial in his possession. This petition has been prepared through his own knowledge of what had transpired. Figures hereinafter in parenthesis indicate folio references of record as indicated in the brief submitted before the New York State Court of Appeals.

Relator was arrested without a warrant in his sister's house. The arresting officer took him into custody on alleged information purported to have been received by one, Detective Rofheart. The state prosecutor claims that an unnamed informer, "just happened to remember a tele-

phone number, he heard being used by a total stranger, while in a tavern drinking" [1707, 3193] which subsequently led to the arrest of your relator. This claim stands completely unsubstantiated and rather incredible when one considers the following:

(A) It is extremely doubtful whether or not there really was any informant or phone call made by anyone;

(B) If there was such an informant it was the duty of the prosecution to produce such person to show whether he or she was and is a reliable source of information. See: *P.* v. *Coffey*, 11 N.Y.2d 142; *Wong Sun* v. *U.S.*, 371 U.S. 471.

[fol. 3] (C) If there was no such informant or if such informant was found not to be reliable as a source of information, then the arrest of relator was in direct *violation of the 4th Amendment to the Constitution of the United States.*

Relator urges that this arrest is inherently illegal and that the use of evidence taken from his home and possession in Jamaicia, Queens, New York [146-147, 165] was the cause of arrest and violated his rights under the *4th* and *14th Amendments to the Constitution of the United States.*

Obviously, by the fact that the arresting officers were unable to produce information sufficient to show probable cause and thereby get a warrant to arrest relator, the whole question of this alleged informant is highly suspect. This arrest can in no way be termed legal, therefore the use of relators clothing should have been omitted from use at his trial, as motioned for by his attorney, and its use comes under the "poison tree fruits" rulings. *P.* v. *Jackson, Robinson, N.Y. Ct. of App. 12-30-63; Wong Sun* vs. *U.S.*, supra.

As the standing rule is, "a search is neither good nor bad because of its success in revealing evidence of a crime and does not become legal because of what it has brought to light," and the fact that the police were unable to obtain any warrant the illegality of the seizure began at its inception, the "taking of relator into custody."

The Supreme Court of the United States has left no room for doubt concerning the mandate of the *4th Amendment to the Constitution of the United States* when it said:

> "* * * it is enforceable against the States by the same sanction of exclusion as is used against the Federal Government, by the application of the same Constitutional standard prohibiting unreasonable searches and seizures * * *." *Ker* v. *Calif.*, 374 U.S. 23, 46.

As the word "person" is contained in the 4th Amendment, than the use of any oral evidence which may be obtained in the course of any illegal seizure is and must be prohibited from use at any subsequent trial.

Furthermore, the intimate relationship held by the [fol. 4] *4th* and *5th Amendments to the Constitution of the United States* when supported by the *14th Amendment* prohibit use of any statements elicited from your relator regardless of whether they were incriminating or exculpatory. The mere fact that they were unconstitutionally seized is enough to ban their admission at any subsequent trial.

Relator further urges that his Constitutional rights guaranteed by the *14th Amendment to the Constitution* were violated when the conflicting nature of an alleged eye-witness, victim's testimony was permited to go uncorrected. A brief summary of such conflicting testimony, vital to say the least, follows:

> she saw defendant's face clearly (2062)
> she saw assailant only for a fleeting moment (2110-2113)
> she could describe skin color and facial features (2192-2193), did not notice the fact that relator had unusual eyes [relator is very cross-eyed] (1185-1186) a fact that would be noticed immediately by anyone, especially witness who is a doctor.

Compare these statements by this witness taken on September 1, 1961, where she positively identifies relator as assailant; her statement of September 20, 1961, where witness stated that her head was "not clear" when she

gave police the September 1, 1961, statement, combined with the fact that on August 25, 1961, after he had been arraigned and ordered held for grand jury and pending assignment of counsel, he was removed from the County Jail against his will and forced to accompany police to a hospital where identification was made under the following conditions:

(1) He was the only negro in the room and handcuffed to a police officer (1191);

(2) He was forced, threatened and coerced into speaking for purposes of eliciting identification as to vocal tones (1802-1804) [assailant had high-pitch voice (2064)];

(3) The action by the police was in direct violation of state court rulings, *P.* v. *Meyers*, 11 N.Y.2d 162; *P.* v. *Rodriguez*, 11 N.Y.2d 279, but also denied this [fol. 5] relator the right to assistance of counsel at a "vital stage after being before a judge" and such action by police officials reduced to nothing, his rights as guaranteed by the *5th and 14th Amendments to the Constitution of the United States.*

SIXTH: That, on the third day of October, 1963, an appeal was taken by relator to the New York State Court of Appeals. On the 30th day of December, 1963, that court affirmed the judgment of conviction.

Thereafter, on the 23rd day of January, 1964, motion for reargument was denied by that court but the remittitur was amended to show that relators rights under the 4th, 5th and 14th Amendments to the United States Constitution were necessarily passed upon and held no violation of any rights of relator was had.

On the 11th day of February, 1964, a copy [certified] of an Order dated the 7th day of February, 1964, signed by Hon. Stanley H. Fuld, Associate Judge of the New York State Court of Appeals was received by the prison authorities, thereby staying the execution of relator, pending "timely filing" and determination on a petition for a writ of certiorari in the United States Supreme Court.

Thereafter, on the 11th day of February, 1964, relator was visited by his appeal attorney, Mr. John C. Schettino,

Esq., 398 Central Avenue, Lawrence, New York, and told that a "timely petition" would be filed in the United States Supreme Court for a writ of certiorari and that relator should not do anything but wait things out.

As 90 days is the prescribed time for applying for certiorari, and an execution delay is for that period of time, the 90 days in relators case would expire on May 6, 1964, after which time a motion for an execution date may be applied for by the State prosecutor if no petition for certiorari had been submitted, or such petition had been submitted and denied by the United States Supreme Court.

However, on or about the 30th day of April, 1964, the New York State Court of Appeals, upon motion submitted by the prosecutor, ordered relator executed sometime during the week of June 8, 1964.

As this action must be done by service of a notice of [fol. 6] motion then the Court of Appeals and relators attorney, Mr. Schettino, were aware that the required time for filing certiorari had not yet expired.

Yet, this assigned attorney, who told relator that a petition for certiorari would be filed, has allowed the time for filing to expire, thereby causing an execution date to be set.

Also, relator asks that it be discovered how the prosecution knew that no application for certiorari would be made even before the 90 day period had expired.

Did attorney Schettino relay such information, knowing full well that he had told relator not to concern himself?

Does not the canon of legal ethics demand that the attorney should have informed relator that he would take no action before the required 90 day waiting period expired to enable relator to either apply for another attorney or submit a petition for writ of certiorari himself?

Is such action a showing of incompetence by this attorney, and if so, how competent was relators appeal handled in the New York Appeal Court?

As certiorari to the United States Supreme Court has been construed as part of a state court remedy (see: *Ex Parte Grotta*, 113 F.2d 574, *Robertson* v. *Skeen*, 117 F. Supp. 848) should not the New York Court of Appeals

have made inquiries as to why such an application was not filed, especially after that court had ordered a stay of execution solely for the submittion of such an application.

In another capital case *Coleman* v. *Denno*, decided 1-24-63 by the 2d Cir. Ct. of App., the question was presented as to whether the 14th Amendment was violated by the refusal of the New York Court of Appeals to assign counsel for purposes of preparing a petition for writ of certiorari.

While that was decided adversely toward Coleman, it is worthy of notice that volunteer attorney's prepared and submitted each and every petition put before the various courts. See: Opinion by U.S.D.J., Sidney Sugarman, 5-25-62, where a hearing was held and it was brought out [fol. 7] licensed attorneys had prepared and submitted all his petitions.

Here we have a different situation.

1. A stay of execution was granted that an application for a writ of certiorari could be submitted to the Supreme Court;

2. An attorney, who had worked on the appeal, reargument motion, and obtained a stay of execution, informed relator that he, the attorney, would submit the certiorari petition for relator;

3. No petition was submitted;

4. An execution date has been set;

5. Had this attorney told relator that he, the attorney, would not submit any certiorari petition, relator could have prepared same and sent it in pro se;

6. That unlike Coleman's case, relator has no services of counsel, voluntary or otherwise to help him prepare the present petition.

7. That the action's of the state and the attorney have worked to deprive relator of due process of law and equal protection of the laws in violation of the *14th Amendment to the Constitution.*

SEVENTH: That, relator has exhausted his state remedies (28 U.S.C. 2254) and although he has failed to apply for a writ of certiorari to the Supreme Court of the

United States, this Court has the power to here this application and order the execution of relator stayed.

This is one of the extra-ordinary cases where certiorari is not to be demanded before applying for relief in a U.S. District Court [*Fay* v. *Noia*, 372 U.S. 391] because now that his attorney has let the time expire wherein certiorari was to be applied for, and relator is scheduled to be executed sometime around June 8, 1964, and he does not know whom he must request a stay of execution from, plus the main fact that he is not at fault in the mixup that has occurred, a stay must be ordered by this Court.

Relator, cannot be made to suffer death because of failure of his attorney to follow through a proceeding that he said he would do and not only failed to proceed, but never even informed relator that he would not take any further action.

[fol. 8] The *14th Amendment* demands that a stay of execution order be issued that this matter may be looked into.

EIGHTH: That, such are the issues involved in this application that relator requests a hearing be held on whatever this honorable court deems worthy of such hearing and that somehow the Constitutional rights of your relator be granted the full protection of the United States Constitution.

NINTH: That, the judgment of the New York State Court of Appeals is illegal and void in that it affirmed the judgment of the Nassau County Court, which judgment was obtained in violation of relator's Constitutional rights.

WHEREFORE, relator, Theodore R. Stovall, prays that a writ of habeas corpus issue directed to Wilfred L. Denno, Warden, Sing Sing Prison, County of Westchester, State of New York, or whosoever has custody of the relator herein, commanding him to produce the body of the said Theodore R. Stovall, before this Court, on the ——— day of ———, 196—, at ——— o'clock in the ——— noon of said day, so that this Court may inquire into the legality of his detention.

DATED: the 6th day of May, 1964.

/s/ Theodore R. Stovall
Relator-pro se
354 Hunter Street
Ossining, New York

[*Duly sworn to by Theodore R. Stovall jurat omitted in printing (all in italics)*]

[fol. 9]

[Motion for leave to proceed in forma pauperis and affidavit in support—filed May 14, 1964 (omitted in printing)]

[fol. 11]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Civ 1505

THE UNITED STATES OF AMERICA, EX REL., THEODORE R. STOVALL, RELATOR

-against-

WILFRED L. DENNO, Warden, Sing Sing Prison, County of Westchester, State of New York, RESPONDENT

ORDER ALLOWING FILING IN FORMA PAUPERIS
—May 14, 1964

Upon reading the annexed affidavit of Theodore R. Stovall requesting that he be permitted to file his petition for writ of habeas corpus without prepayment of fees or costs or security therefor, and it appearing to the Court that this application should be granted, it is

ORDERED, that the filing thereof be and hereby is permitted without prepayment of fees or costs or security therefor, in accordance with Section 1915(a), Title 28, U.S.C., and it is further

ORDERED, that the petition for writ of habeas corpus be placed on the appropriate Motion Calendar.

Dated: May 14, 1964.

/s/ Wilfred Feinberg
U. S. D. J.

Copy Received May 14, 1964, U.S. Attorney So. Dist. of N. Y., Robert M. Morgenthau

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Civil 1505

[File Endorsement Omitted]

UNITED STATES EX REL., THEODORE STOVALL, PETITIONER

-against-

HONORABLE WILFRED L. DENNO, As Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT

MOTION TO AMEND THE PETITION FOR WRIT OF HABEAS CORPUS AND AFFIDAVIT—filed June 1, 1964

SIRS:

PLEASE TAKE NOTICE that (upon the annexed affidavit of Leon B. Polsky and the prior proceedings herein the undersigned will move this Court at Courtroom 318, United States Court House, Foley Square, New York, on the 1st day of June 1964 at ten-thirty o'clock in the forenoon or as soon thereafter as counsel may be heard for leave to amend the Petition for Writ of Habeas Corpus heretofore submitted.

Yours, etc.,

ANTHONY F. MARRA
The Legal Aid Society
Attorney for Petitioner
100 Centre Street
New York, New York 10013

TO:

HONORABLE WILLIAM CAHN
District Attorney
Nassau County
Old Country Road
Mineola, New York

[fol. 13]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEON B. POLSKY, being duly sworn, deposes and says:

I am an attorney associated with Anthony F. Marra, assigned by the Honorable Wilfred Feinberg on May 20, 1964 to represent Theodore Stovall on his petition for writ of habeas corpus.

Your deponent has examined the printed volumes of the Record on Appeal to the Court of Appeals of the State of New York and has examined the briefs filed by the parties in that Court on Petitioner's appeal to that Court from a judgment convicting him of the crime of murder in the first degree and sentencing him to death by execution. I have also examined the Petition for a writ of habeas corpus prepared by Petitioner, *pro se*, and filed herein on May 14, 1964.

In his Petition, Mr. Stovall challenged the lawfulness of his arrest and the search incident thereto which uncovered evidence used against Petitioner at his trial on the grounds that, ". . . the use of evidence [illegally] taken from his home . . . was the cause of arrest and violated his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States." (Petition, p. 3).

After examination of the papers and records set forth above and based upon rulings at trial and rules of law more fully set forth in the accompanying Memorandum of Law, permission is requested to amend the Petition, pursuant to 28 U.S.C. § 2242, as follows:

[fol. 14] 1. Petitioner was denied his rights under the Fourth and Fourteenth Amendments of the Constitution of the United States by the ruling of the trial court that the "fruit of the poison tree" doctrine does not apply to the State of New York, thereby precluding further inquiry thereon; and further that the New York rule of law placing the burden upon a defendant to show lack of

probable cause is constitutionally erroneous; and, that these rulings deprived this Petitioner of a constitutionally adequate hearing and determination in and by the courts of New York on the merits of his claim of unreasonable search and seizure.

WHEREFORE, it is respectfully prayed that leave be granted to amend the Petition, as set forth above, and that the Writ of Habeas Corpus issue and be sustained unless Petitioner is retried within a reasonable time thereafter under an adequate standard.

/s/ Leon B. Polsky

Sworn to before me this 29 day of May, 1964.

/s/ Irene B. Parker
IRENE B. PARKER
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-3017500
Qualified in Queens County
Term Expires March 30, 1965

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civ. 1505

[File Endorsement Omitted]

UNITED STATES EX REL. THEODORE R. STOVALL,
PETITIONER

-against-

HONORABLE WILFRED DENNO, as Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT

APPEARANCES:

ANTHONY F. MARRA, ESQ.,
Attorney for Petitioner,
The Legal Aid Society,
100 Centre Street,
New York, New York 10013.

LEON B. POLSKY, ESQ.,
Of Counsel.

WILLIAM CAHN, ESQ.,
District Attorney of Nassau County,
County Court House,
Mineola, New York.
Attorney for Respondent.

HENRY P. DEVINE, ESQ.,
Assistant District Attorney,
Of Counsel.

OPINION—July 14, 1964

WYATT, District Judge,

This is an application for a writ of habeas corpus by Theodore R. Stovall confined in a prison of the State of New York under sentence of death after conviction for [fol. 16] murder in the first degree. The application is

made under 28 U.S.C. § 2241(c)(3) and is brought in forma pauperis under 28 U.S.C. § 1915(a). Anthony F. Marra, Esq., of The Legal Aid Society was assigned to represent relator and Leon B. Polsky, Esq., of The Legal Aid Society has been of counsel ably presenting the arguments for relator.

After trial before a jury in Nassau County Court, a verdict of guilty of that count in the indictment charging murder in the first degree was returned on June 8, 1962. There was a verdict of guilty on other counts of the indictment but this is without present significance.

The charge of murder in the first degree of which relator was found guilty was based on the stabbing to death of Dr. Paul Behrendt in the kitchen of his home in Garden City on the night of August 23-24, 1961.

Sentence of death was imposed on the first degree murder count on September 6, 1962.

Appeal was taken directly to the Court of Appeals where the judgment of conviction of murder in the first degree was unanimously affirmed on December 30, 1963 (13 N.Y. 2d 1094; 246 N.Y.S.2d 410).

On January 23, 1964, the remittitur was amended by the Court of Appeals to show that the Court had passed [fol. 17] on questions under the United States Constitution, including a contention that he was convicted on evidence obtained by unlawful search and seizure. The Court held that the constitutional rights of relator had not been violated (13 N.Y.2d 1178; 248 N.Y.S.2d 56).

The basis of the present application to this Court is that evidence was admitted at trial which was obtained as the result of an unlawful search and seizure. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). More specifically the claim is that in passing on the admissibility of the questioned evidence New York applied a "constitutionally impermissible standard" (Memorandum for Petitioner, p. 3) in two respects: (a) as to burden of proof, and (b) as to the "poison fruit" doctrine.

The only evidence to which the constitutional claim can relate is a white jacket (2041; parenthetical references are to folio numbers in the printed Record on Appeal to the Court of Appeals of New York), a pair of trousers (2494), and a hat (2505).

These articles were given to the arresting officers by a sister of the defendant at the time he was arrested in her apartment at 85 Wellington Road at Hempstead at about 4:15 in the afternoon of August 24, 1961 (144, 150, 152, [fol. 18] 159, 168, 169, 1281, 1380-81).

The theory of the defense at the trial as to these items was that they were the fruits of an illegal search and seizure by police officers in the rooms of defendant himself in Jamaica, Long Island (94, 147, 171, 1134-35, 1199, 2395-99).

It is established that police officers went to the rooms of defendant in Jamaica at about 3 o'clock in the afternoon of August 24, 1961 and there, without a search warrant, obtained a shirt, a pillow case, and a bed sheet (2395-99, 2414). The circumstances of this visit and the items obtained were not mentioned nor developed by the People, but by counsel for defendant. The articles obtained were actually marked as Defendant's Exhibits for Identification (1199, 1200, 2397-98).

It is also established that the articles obtained in Jamaica were taken to a Chinese laundry near by (the name of which was supplied by the landlord of defendant, 2424) and were found to have the same laundry mark as a shirt found at the scene of the crime (147, 518, 523, 662, 2417, 2424-26).

The theory of the defense was that the illegal search and seizure at Jamaica caused the police to arrest defendant, that the arrest was thus unlawful, and that [fol. 19] consequently the search and seizure which obtained the evidence (white jacket, pants, and hat) and which was incident to the arrest was an unlawful search and seizure.

For purposes of this decision, it will be assumed that the search in Jamaica was unlawful. The People so conceded, but there is a question whether the officers were not voluntarily admitted by the landlord of defendant and given the articles by him (641-45, 1875-78, 2396-99).

It is clear that the trial judge made an erroneous decision when he ruled in effect that *Mapp* v. *Ohio*, above, was not good law in New York (197, 711, 723).

This erroneous ruling did not, for several reasons, violate any constitutional rights of defendant.

The People offered in evidence nothing which was obtained in Jamaica. It was the defense which brought out the event and the articles obtained in Jamaica were marked as exhibits for identification by defendant. The District Attorney had said before any trial testimony was taken that he would offer no items obtained in Jamaica (125).

There was a source of information leading to the arrest of defendant, earlier and entirely independent of the Jamaica search.

This earlier and independent source was Walter Giro- [fol. 20] deau. He had been with Stovall in the evening before Dr. Behrendt was killed, had given Stovall his telephone number, and Stovall in a white jacket belonging to Dr. Behrendt had telephoned him from the Oasis Bar, near Dr. Behrendt's home (149, 172, 192, 503, 1836, 3210, 3387). The police went to the Oasis Bar about 8 in the morning of August 24 learned that a man had been in the Bar the evening before in a white jacket and made a telephone call, and then learned the telephone number which had been called by the man in the white jacket (149, 172, 1813, 1823, 1836, 1856, 3031, 3039, 3056). As one of the police put it: "That was our first break" (1836). The police at once called the telephone number, found it was the telephone of Girodeau, and got from him the name of defendant as well as the address of the sister of defendant in Hempstead, where the arrest was made (1839, 1840, 1856, 1859, 3214-15, 3280, 3389). This was before 9 o'clock of the morning of August 24 (1813, 1856, 3214, 3389-90) or about six hours before the search at Jamaica at 3 o'clock in the afternoon (2414).

The authorities seem clear that where there is a source of information leading to an arrest, which information is independent of information obtained from an unlawful search and seizure, then the arrest is lawful. *Wong Sun* [fol. 21] v. *United States*, 371 U.S. 471 (1963); *Costello* v. *United States*, 365 U.S. 265 (1961); *Nardone* v. *United States*, 308 U.S. 338 (1939); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). These cases were cited to the Court of Appeals of New York to sustain the conviction (People's Brief, p. 44).

Finally—and apart from the arrest of Stovall—there was no search and seizure to secure the articles offered by the People in evidence. The proof is convincing that the articles were voluntarily turned over to the police by the sister of Stovall (157, 168, 169, 1281) and, of course, it was in her apartment that Stovall was arrested.

Whatever standards New York may have applied and however mistaken the trial judge may have been as to the reach of *Mapp* v. *Ohio*, the record establishes that no constitutional rights of defendant were violated.

The Court takes occasion to express thanks to Anthony F. Marra, Esq., and Leon B. Polsky, Esq., for their able services in representing the petitioner.

The application for a writ of habeas corpus is denied.

SO ORDERED.

Dated: New York, New York
July 14, 1964

/s/ INZER B. WYATT
United States District Judge

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket # 29208

[File Endorsement Omitted]

UNITED STATES OF AMERICA EX REL., THEODORE STOVALL,
RELATOR-APPELLANT

-against-

HON. WILFRED L. DENNO, As Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT-APPELLEE

APPENDIX FOR RELATOR-APPELLANT—filed December 4, 1964

[fol. 23]

IN THE DISTRICT COURT OF THE COUNTY OF NASSAU STATE OF NEW YORK: FIRST DISTRICT

Index No. Fel. 685/1961

THE PEOPLE OF THE STATE OF NEW YORK

-against-

THEODORE R. STOVALL, DEFENDANT

MINUTES OF ARRAIGNMENT—August 25, 1961

Held before the Honorable Benjamin Zipper, District Court Judge, at the First District Court, Arraignment Part, Mineola, New York, on August 25, 1961.

VIOLATION: Section 1044-1 Penal Law.

APPEARANCES:

ARTHUR RANDALL, ESQ.,
Assistant District Attorney,
Nassau County, New York,
For the People

Defendant in person.

Reported by
ALVIN ABRAMSON,
District Court Stenographer

[fol. 24] THE COURT: Are you Theodore R. Stovall?

THE DEFENDANT: Yes.

THE COURT: Is that the way you pronounce your name?

THE DEFENDANT: Yes.

THE COURT: Do you live at 111-10 145th Street, Jamaica?

THE DEFENDANT: Yes.

THE COURT: You're charged by Robert Rofheart, Shield 66, as follows: "that he is a detective attached to the Homicide Bureau, Nassau County Police Department,

and that on the 24th day of August, 1961, at 70 Pine Street, Garden City, New York, in the County of Nassau, the defendant did wilfully, wrongfully and unlawfully violate the provisions of Section 1044 subdivision 1. of the Penal Law of the State of New York, in that at the time and place aforesaid, the defendant, Theodore R. Stovall, did wilfully, feloniously and of malice afore-thought, and with a deliberate and premeditated design to effect the death of Paul Behrendt, struck, stabbed [3] and killed Paul Behrendt with a knife. Wherefore he prays that the said Theodore R. Stovall may be arrested and dealt with in the premises according to law." Subscribed and sworn to before me today by Robert Rofheart.

The charge against you is violating Section 1044 sub- [fol. 25] division 1 of the Penal Law of the State of New York, which is murder in the first degree. You have the right to the aid of a lawyer or counsel in every stage of the proceeding and before any further proceedings are had. Do you want to get a lawyer? If you do, I'll give you time to get one before we proceed at this particular time.

THE DEFENDANT: Yes, sir.

THE COURT: Now, I wish to advise that—you're getting your own lawyer; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: All right, I'll put it over to August 31st, next Thursday, for the purpose of getting an attorney. The defendant [4] is remanded pending further pleading.

That's all.

(Whereupon, the arraignment of Theodore R. Stovall was adjourned to August 31, 1961.)

[Stenographer's Certificate to foregoing transcript omitted in printing]

[fol. 27]

IN THE DISTRICT COURT OF THE COUNTY OF NASSAU STATE OF NEW YORK: FIRST DISTRICT

Index No. Fel 685/1961

THE PEOPLE OF THE STATE OF NEW YORK

against

THEODORE R. STOVALL, DEFENDANT

MINUTES OF ARRAIGNMENT—August 31, 1961

BEFORE: HON. HAROLD F. STROHSON,
District Court Judge

* * * *

Charge: Vio. Sec. 1044 P.L.

ANTHONY CAVALLO
Official Court Steno.

[fol. 28] [2]THE COURT: People against Theodore R. Stovall.

Are you Theodore R. Stovall?

MR. STOVALL: Yes, I am.

THE COURT: You were advised that you were given time until today, August 31, to return here with a lawyer. Have you obtained counsel?

MR. STOVALL: I have requested for one, sir.

THE COURT: You have requested. Who did you request?

MR. STOVALL: I requested the jailhouse where I was at for a lawyer.

THE COURT: Well, did you get in touch with any of your relatives to see if they would get counsel for you, or a lawyer for you?

MR. STOVALL: No, I didn't

THE COURT: Well then, what were you advised over in the jail?

MR. STOVALL: They said I would get one. They told me to write a letter to the warden and he said I would be assigned to a lawyer.

THE COURT: Well, you see, this Court [3] cannot assign a lawyer to you. We have no power to do that. The only Court that can do this is the County Court. [fol. 29] The County Court has the power to assign counsel, and of course they can't do it until you are in that Court.

Now, you have certain rights in this Court. The first of which is the right to the aid of a lawyer. Now, if you have no lawyer, then the next step is that you have a right to demand and examination or waive an examination. If you waive the examination of the charge against you, you you will be referred to the Grand Jury and at that time, if, as and when you are indicated, the County Court will assign a lawyer to you for your defense.

Counsel George Mulry, would you be willing to help this man protect his rights in this Court at this time?

MR. MULRY: In this court I will.

THE COURT: That's what I mean. Would you like to take him out and confer with him, or do you want to sit down at the table there and explain to him?

[4] MR. MULRY: I could explain right at the table.

THE COURT: Sit down with this lawyer, Mr. Stovall. He is a lawyer who will volunteer his services to help you now, protect your rights.

[fol. 30] (After a short recess between Mr. Mulry and Mr. Stovall, the arraignment continued.)

THE COURT: Are ywe ready with Stovall?

MR. MULRY: Yes. Your Honor, I have a copy of the charge before me and I have read it, so we waive the reading of it, but Mr. Stovall demands a hearing in this Court.

THE COURT: Well, I guess the charge has already been read to him. When do you want to set the date?

MR. MULRY: I would like to make it tomorrow

THE COURT: September 1st at 2:00 P.M.

MR. MULRY: Yes.

THE COURT: You understand what is happening Mr. Stovall, don't you.

MR. MULRY: I explained it to him.

THE COURT: You understand what we are [5] doing?

MR. STOVALL: I understand.

THE COURT: That you are taking for an examination so you could be confronted with the witness and the judge could decide whether or not there has been a crime committed here.

MR. STOVALL: Yes.

THE COURT: All right, September 1st for examination.

* * * *

[fol. 31]

[Stenographer's Certificate to foregoing transcript omitted in printing]

[fol. 32]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 307—September Term, 1964.

Argued January 21, 1965

Docket No. 29208

UNITED STATES EX REL. THEODORE R. STOVALL,
APPELLANT

v.

HONORABLE WILFRED DENNO, as Warden of Sing Sing Prison, Ossining, New York, APPELLEE

Before:

MOORE, FRIENDLY and MARSHALL,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, denying an application by a state prisoner for a writ of *habeas corpus*. Reversed.

LEON B. POLSKY (Anthony F. Marra, The Legal Aid Society, New York, N. Y.), *for Appellant.*

HENRY P. DEVINE, Assistant District Attorney (William Cahn, District Attorney, Nassau County), *for Appellee.*

[fol. 33] OPINION—March 31, 1965

FRIENDLY, *Circuit Judge*:

Theodore Stovall, under sentence of death for the brutal murder of Dr. Paul Behrendt in Nassau County, N. Y., appeals from Judge Wyatt's denial of an application in

the District Court for the Southern District of New York, for a writ of *habeas corpus*. The judge granted a certificate of probable cause, 28 U. S. C. § 2253, and leave to appeal *in forma pauperis*, 28 U. S. C. § 1915(a), and reassigned the Legal Aid Society to represent Stovall on appeal, 28 U. S. C. § 1915(d).

We wish to make clear at the outset that the ground which was principally argued to us and on which we are constrained to reverse, although raised in Stovall's handwritten petition in the district court, was not argued to and consequently was not discussed by Judge Wyatt, counsel having relied on a quite different point mentioned at the end of this opinion. We do not at all approve this method of presentation. But since the case is a capital one, and the relevant facts are sufficiently revealed in the state court record, we shall dispose of the appeal on the merits—as, indeed, the Assistant District Attorney has commendably requested.

Late on the night of August 23-24, 1961, Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island. His wife, Dr. Frances Behrendt, vainly coming to his assistance, was greviously wounded. The police, who quickly arrived on the scene as the result of a telephone call for medical aid which Mrs. Behrendt had managed to make, found many pieces of telltale evidence. They discovered a key chain with three keys, one of which was to Stovall's locker in a Brooklyn store where he worked. They also found a bloody shirt with the identification tag of a laundry used by Stovall. Further investigation in the morning of August 24 led [fol. 34] the police to a bar which Stovall had visited the previous night. This, in turn, brought them to a man whom Stovall had called by telephone from the bar; he supplied Stovall's name and the address of Stovall's sister in Hempstead, Long Island. Proceeding to this address around 4 P.M., the police found Stovall and also Dr. Behrendt's blood-stained white coat. They arrested him and seized the coat, a pair of trousers owned by Stovall which were stained with blood of Mrs. Behrendt's blood type, and his pork-pie hat. The shirt left in the Behrendt kitchen was similarly stained, but a piece torn from it,

found under Dr. Behrendt's armpit, was colored with blood of the Doctor's type. At the trial Stovall's sister and a man who was living with her testified to Stovall's appearance at her room in Hempstead around 12:30 A.M. on the morning of August 24, without the white shirt he had been wearing earlier that evening but with the white jacket and with bloody pants and a smear of blood on his forehead. Mrs. Behrendt identified Stovall at the trial.

With all this identification evidence—and there was a good deal more—it may be wondered what justification can exist for federal interposition. The answer lies in an episode we shall now recount.

On the evening of August 24, Stovall was questioned by the prosecutor at police headquarters; the statement was almost wholly exculpatory. The next morning he was arraigned, on a detective's charge of first degree murder, before a state district court judge. The judge informed Stovall, as required by § 188 of the New York Code of Criminal Procedure, "You have the right to the aid of a lawyer or counsel in every stage of the proceedings and before any further proceedings are had"; asked, "Do you want to get a lawyer?"; and said, "If you do, I'll give you time to get one before we proceed at this particular time." Stovall answered that he did, and on the judge's further [fol. 35] inquiry, "you're getting your own lawyer; is that right?", responded in the affirmative. The judge then announced that he would "put it over to August 31st, next Thursday, for the purpose of getting an attorney," and directed that Stovall be "remanded pending further pleading."

Section 192 of New York's Code of Criminal Procedure prescribes, so far as here pertinent, that "If an adjournment be had for any cause, the magistrate must commit the defendant for examination." [1] and § 193 adds that the commitment shall be to the sheriff, save in New York City where it is to be to the commissioner of correction. We were told at the argument that the sheriff of Nassau

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[1] Of course, this means *pending* examination of the charge by the magistrate—not examination *of* the defendant.

County does not have a representative available in the arraigning courts and that responsibility for placing committed defendants in his hands rests with the police. After the arraignment but apparently before Stovall was handed over to the sheriff, two detectives took him, handcuffed to one of them, to the hospital where Mrs. Behrendt had undergone extensive surgery, and into her room.—Three high police officers and two prosecutors were also there. One of the police officers asked Mrs. Behrendt whether Stovall was "the man"; she said he was. At some time one of the officers asked Stovall "to say a few words for voice identification"; he did—just what does not appear.

In opening the case at trial the prosecutor said, outlining the People's evidence:

> "There will be further evidence that Mrs. Behrendt observed this defendant while she was in the hospital and the defendant was taken to her. She identified him. I don't believe that she has ever seen him since, and whether she will be able to identify him here in [fol. 36] court I do not know at this time. But she will be called and, gentlemen, in short there will be other evidence that will be produced for your consideration."

Defense counsel made no objection or request for a mistrial. When the two detectives were called, before Mrs. Behrendt was asked to testify, defense counsel cross-examined them as to the hospital identification, bringing out, among other things, that the police chiefs and the prosecutors had been with Mrs. Behrendt before Stovall entered in handcuffs, that there was no line-up, and that Stovall was the only Negro in the room. In the course of her testimony Mrs. Behrendt identified Stovall in court and, without objection, stated she had also seen him in the hospital. N. Y. Code of Criminal Procedure § 393-b.

Stovall contends that use of the hospital identification constituted a denial of his right to counsel and a violation of the privilege against self-incrimination, guaranteed respectively by the Sixth and Fifth Amendments, now held to have been made applicable to the states by the Four-

teenth, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and also that the procedure employed at the hospital so prejudiced the identification that its use violated the due process clause of the Fourteenth Amendment. We need deal only with the first contention.

New York does not dispute that Stovall's constitutional right to counsel had come into being when he was brought before a judge for arraignment. *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *White* v. *Maryland*, 373 U. S. 59 (1963). The judge's belief that Stovall was obtaining counsel of his own choosing was understandable, even though, at the adjourned hearing, it turned out that Stovall was without means and wished counsel to be assigned. But a prospect of counsel is not the same as having one, and once the right was attached and has not [fol. 37] been waived, there are means—interrogation being the most obvious—from which, in the absence of waiver, the state no longer can gain incriminating evidence without notice to him, whatever the situation in the "investigatorial" stage. Consistent with this constitutional requirement, New York Code of Criminal Procedure directs that after informing the defendant of "his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had," § 188, the magistrate must "allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose," and, upon defendant's request, must send a peace officer to take a message to counsel, § 189. Here, without awaiting the presence of counsel, New York caused Stovall to be brought before Mrs. Behrendt for identification, and then used that testimony to his detriment at the trial.

The State's first answer is that testimony concerning the hospital identification was initially brought out by the defense in cross-examination, and that at no time did it object to disclosure of the incident to the jury. Normally there could be no valid claim of error if a defendant presented evidence which he could bar and the State followed with a then harmless repetition. However, the prosecutor had unequivocally announced at the start of the trial that Mrs. Behrendt would testify to her earlier

identification; in this context, defense counsel's attempt to discredit such evidence in advance, while the detectives were available for cross-examination, rather than having to recall them, cannot fairly be deemed an independent attempt to introduce the identification as part of Stovall's case. The failure to object to the State's announced intention to offer the hospital identification is more troublesome. Although a mistrial could have been sought when the prosecutor first mentioned this in his opening, it would be going too far to insist on so instantaneous [fol. 38] a reaction, with the risk of dramatizing the incident to the jury if the request were denied. But there was time for defense counsel to seek an exclusionary ruling, outside the presence of the jury, before the detectives took the stand. While we see no real excuse for this omission, we doubt that the Supreme Court would permit so demanding a standard in a capital case.[2]

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[2] We have had some concern whether any New York court has ever had an opportunity to consider the objection as to Mrs. Behrendt's identification. Point IV of Stovall's brief in the New York Court of Appeals deals with the hospital identification; in the course of this, it was argued (p. 37) that "What transpired at the hospital was after the defendant had been arraigned, while the defendant was under arrest and while the defendant was without counsel," citing *People* v. *Meyer*, 11 N. Y. 2d 162, 227 N. Y. S. 2d 427 (1962), and *People* v. *Rodriguez*, 11 N. Y. 2d 279, 229 N. Y. S. 2d 353 (1962). The People's brief said in answer (p. 48) only that the testimony complained of was elicited at the trial in cross-examination of one of the detectives. After affirming the conviction on the first degree murder count, 13 N. Y. 2d 1094, 246 N. Y. S. 2d 410 (1963), the Court of Appeals amended its remittitur to state that there were presented, and it had necessarily passed upon, various questions under the Federal Constitution, including appellant's contention "that his rights under the Fifth Amendment of the Constitution of the United States were violated in that appellant was compelled to testify against himself after arraignment." 13 N. Y. 2d 1178, 248 N. Y. S. 2d 56, 57 (1964). In the light of Stovall's brief in the Court of Appeals and the cases there cited, this can be charitably read as including the Sixth Amendment contention as to the same episode. If, on the other hand, it be thought that Stovall never did raise the Sixth Amendment claim in the New York courts, and if we should assume that he would be required now to present this by an available state method, there appears to be no way in which he can raise it now, see *People* v.

The State also argues that the lack of counsel worked no prejudice since the hospital "show up" did not amount to self-incrimination and therefore counsel could not have prevented it. Quite apart from whether the privilege against self-incrimination covers evidence obtained outside the courtroom and later sought to be introduced, see [fol. 39] 8 Wigmore, Evidence § 2252, at 328 & n. 27 (McNaughton rev. 1961), it is usually said that the privilege does not invest a defendant with immunity from exposing himself to identification, even if this includes some movement, such as going from the jail to the courtroom for trial or rising, if called upon, see *People* v. *Gardner*, 144 N. Y. 119, 127-30 (1894); 8 Wigmore, *supra*, § 2265; Maguire, Evidence of Guilt § 2.04 at 25-33 (1959); and it may well be argued that use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently than that of the arm muscles. See *Holt* v. *United States*, 218 U. S. 245, 252 (1910); 8 Wigmore, *supra*, § 2265 at 396 & n. 9. The bulk of decisions on this subject deal with what testimony can be given when the defendant has taken the action directed or what comment can be made when he has refused to take it—not with what counsel can do to prevent the issue from arising or, if unsuccessful in that, to see to it that the episode takes place in the most benign form. Mr. Justice Holmes made this distinction in the *Holt* case, where the defendant, a soldier under arrest, had put on a blouse on the order of officers constituting a board of investigation, and testimony that it fitted was introduced at the trial: "Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent, *Adams* v. *New York*, 192 U. S. 585," 218 U. S. at 253.[3]

Howard, 12 N. Y. 2d 65, 236 N. Y. S. 2d 39 (1962), cert. denied, 374 U. S. 840 (1963), and *Fay* v. *Noia*, 372 U. S. 391, 434-35, 438-40 (1963), would seem applicable.

[3] The *Holt* decision antedated the development, in *Weeks* v. *United States*, 232 U. S. 383 (1914), of the federal law as to use of illegally obtained evidence. See the comment on *Adams* v. *New York* in the *Weeks* opinion, 232 U. S. at 394-96.

The question whether the lack of counsel was prejudicial to Stovall does not turn on whether forbidden self-[fol. 40] incrimination occurred. Assuming that the trip involved no such violation, there were still many things that counsel might have done. He might have persuaded the prosecutor, in the state's own interest, if not to forgo the hospital identification, at least to assure conditions better designed to avoid suggestion. He might have persuaded the judge to direct that Stovall be immediately sent to and then kept in jail pending trial, or be put before Mrs. Behrendt only under fair conditions such as a line-up, or be accompanied by counsel who might question her. See *Commonwealth* v. *Brines*, 29 Pa. Dist. 1091 (C. P. 1920). Or, as a last resort, he might have advised Stovall to refuse to go, or to remain silent if taken by force. Granting all this, it remains true that the chance that counsel's presence would have altered events is considerably less here than in the case of voluntary confessions, where a lawyer's advice can almost insure that none would be forthcoming. Nevertheless, Stovall's transportation to the hospital, his modicum of cooperation in the visit and the nature of the identification procedure, each would have offered counsel an opportunity to intervene; taking them all together, in the context of a capital case, we cannot say his probability of success was so slight that the lack of counsel was harmless.[4] Even if Mrs. Behrendt's condition had been such as to make it imperative that Stovall be taken to the hospital when and as he was, which the record does not indicate, there was no similar compulsion on the [fol. 41] prosecutor to use the evidence against Stovall, and we think the Sixth Amendment precluded this.

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[4] Our illustrations of what counsel might have done carry no implications whether denial of any such requests would have violated Stovall's federally protected rights. Prejudice exists if lack of counsel resulted in the loss of rights that the state might well have accorded. See *Tomkins* v. *Missouri*, 323 U. S. 485, 489 (1945). We must await further enlightenment whether, once the right to counsel has attached, all further investigational activity involving some cooperation by the defendant must be with counsel's consent or at least on notice to him.

Even with our incomplete statement of the massive evidence showing Stovall to have been the killer of Dr. Behrendt, it would be naive not to recognize that the episode of the hospital identification has been overblown to a significance out of all proportion to anything it could have had at the trial. Indeed, at the argument in this court, counsel for Stovall stated, with complete frankness, that at a new trial the defense primarily relied on would be insanity—an issue which was raised and necessarily found against him at the first trial and on which the hospital identification had no bearing. A blunder by the prosecutor in offering the evidence, which had no probable causal relation in the verdict, is thus to result in a new trial on the defense of insanity which Stovall has already had a fair opportunity to establish.[5] We do not find our role in bringing this about a particularly congenial one. But the only principle upon which the relative unimportance of the hospital identification could justify denial of the writ would be the doctrine of harmless error, applied in *United States* v. *Guerra*, 334 F. 2d 138, 144-47 (2 Cir.), cert. denied, 379 U. S. 936 (1964). Here, in contrast to that case, where the unlawfully obtained statement was "an abortive attempt to impeach" the defendant "on a minor issue," the statement was inculpatory on the central question of his presence on the occasion of the crime; indeed, Mrs. Behrendt's was the only identification that was testimonial rather than circum-
[fol. 42] stantial,[6] and the jury asked that all her testimony be reread. A claim of harmless error as to a conviction must surmount an exceedingly high hurdle, even on collateral attack, when the error was constitutional and the punishment is death. See *Bruno* v. *United States*, 308 U. S. 287 (1939); *Kotteakos* v. *United States*, 328 U. S. 750, 764-65 (1946); *Stewart* v.

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[5] Stovall in fact made little effort to show insanity, the pertinent evidence coming chiefly from the State; but it remains true that a wholly unrelated error now gives Stovall a fresh chance to present a defense otherwise foreclosed.

[6] The case vividly illustrates how much *more* probative a multiple strand of circumstantial evidence may be than a testimonial identification. See 1 Wigmore, Evidence § 26 (3d ed. 1940).

United States, 366 U. S. 1, 9-10 (1961); *Hamilton* v. *Alabama*, *supra*, 368 U. S. 52. The hurdle is too high for this case.[7]

In view of this ruling, a brief word on the constitutional point argued to the district judge will suffice. Around 3 P.M. on the afternoon of August 24 police officers, without a search warrant, obtained access to Stovall's own rooms in Jamaica, Long Island, and seized a shirt, a pillow case, and a bed sheet, which had the same laundry marks as the shirt left in Dr. Behrendt's kitchen. Before and during the trial, defense counsel sought a hearing whether these objects, not offered by the People, had led to the seizure of articles of clothing attendant [fol. 43] on Stovall's arrest. The trial judge denied such a hearing, erroneously, see *Wong Sun* v. *United States*, 371 U. S. 471, 484-88 (1963), on the basis that the principle of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), did not extend to fruits of an unlawful search. Judge Wyatt nevertheless overruled the objection since, as he found, "There was a source of information," to wit, the man to whom Stovall had telephoned from the bar, "leading to the arrest of defendant, earlier and entirely independent of the Jamaica search." Not challenging this finding, counsel contends that Stovall was nevertheless prejudiced since a New York judge might have found differently or have

[7] As a constitutional matter, there is no obvious reason why a new trial need be held on an issue "distinct and separable" from that vitiated by improper evidence or instructions, see *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U. S. 494, 500 (1931); and if New York law permitted a new trial on the issue of commission excluding insanity, which we seriously doubt, cf. Code of Criminal Procedure, §§ 464, 544, we see no reason why that would not meet federal requirements. Compare *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 245-46 (1957); *Jackson* v. *Denno*, 378 U. S. 368, 395-96 (1964). New York has recently provided that a conviction of first degree murder be followed by further evidence and deliberation by the jury to fix the penalty, and the New York statute provides that error in the latter phase has no effect upon the conviction. N. Y. Penal Law § 1045-a. California now requires that the insanity defense be considered by the jury in murder cases after it has in turn convicted and fixed sentence, but the statute does not speak to the question of partial new trials as between commission and insanity. Cal. Penal Code §§ 190.1, 1026.

been satisfied with a smaller infiltration of poisoned sap, and also because, for reasons not apparent to counsel or to us, Stovall's attorneys in the state trial reacted to the erroneous ruling by themselves displaying to the jury the results of the Jamaica search. We find it unnecessary to resolve these contentions, since we are confident that at a new trial a proper preliminary hearing will be had.

The denial of *habeas corpus* is reversed, with instructions that the writ issue unless, within a reasonable time, New York affords Stovall a new trial.

MOORE, *Circuit Judge* (dissenting):

Dr. Frances Behrendt concededly (by the majority) greviously wounded was in a hospital where she had undergone extensive surgery. Her husband, Dr. Paul Behrendt, had been killed. The defendant was arraigned on August 25, 1961 and, having requested an opportunity to get his own lawyer, the court without proceeding further postponed the case to August 31st. The only person in the world who could exonerate Stovall and save him from possible execution was Dr. Frances Behrendt. Her [fol. 44] words, "He is not the man" could have meant life or death to Stovall. Stovall could wait for six days to retain a lawyer. Whether Dr. Frances Behrendt could wait even six hours was conjectural. No amout of subsequent skillful legal advice could replace the need for action while she yet lived—action which required Stovall's immediate presence in the hospital room.

Every defendant in a criminal case is subjected to identification. Even while he is presumed to be innocent, in the presence of the jury he is called the defendant. If the crime was of a violent nature, one or more police officers are present. He rises for identification purposes or a witness places a hand on his shoulder to indicate the person concerning whom testimony is being given.

The majority characterize the prosecutor's action as a "blunder." I wonder what word they would have used, assuming that Dr. Behrendt had died later that day, had the police immediately lodged Stovall in jail and failed to

take him to her room while there was still time. It is too easy after the event for appellate courts to conjure up all the might-have-been possibilities and the hypothetical steps and maneuvers an attorney might have taken.

I find no error in the identification procedure or the way it was used upon the trial and, hence, would affirm the denial of the writ.

[fol. 45] IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * * *

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA, EX REL.

THEODORE STOVALL, RELATOR-APPELLANT

v.

WILFRED L. DENNO, As Warden of Sing Sing Prison, Ossining, New York, RESPONDENT-APPELLEE

JUDGMENT—March 31, 1965

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

Further ordered, adjudged and decreed that the writ of habeas corpus shall issue unless, within a reasonable time, the State of New York affords appellant a new trial.

A. DANIEL FUSARO
Clerk

[fol. 46]

[File Endorsement Omitted]

[fol. 47] IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 307—September Term, 1964

Argued January 21, 1965

Submitted *en banc* to this Court on May 26, 1965

* * * * * *

Docket No. 29208

UNITED STATES EX REL. THEODORE R. STOVALL,
APPELLANT

—against—

HONORABLE WILFRED DENNO, as Warden of
Sing Sing Prison, Ossining, New York, APPELLEE

Before:

LUMBARD, *Chief Judge*,
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS and ANDERSON, *Circuit Judges*

Appeal from an order of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, denying an application by a state prisoner for a writ of habeas corpus. Affirmed.

LEON B. POLSKY (Anthony F. Marra, The Legal Aid Society, New York, N. Y.), *for Appellant.*

[fol. 48] HENRY P. DEVINE, Assistant District Attorney (William Cahn, District Attorney, Nassau County, State of New York), *for Appellee.*

OPINION—January 31, 1966

MOORE, *Circuit Judge* (with whom Judges Kaufman, Hays and Anderson concur; Judge Lumbard concurs in a

separate opinion with whom Judge Kaufman also concurs; Judge Friendly dissents in a separate opinion with whom Judge Waterman concurs; and Judge Smith dissents in a separate opinion):

Theodore Roosevelt Stovall appeals from an order dismissing a writ of habeas corpus. The appeal was argued originally before a panel of this Court (Moore, Friendly and Marshall, *C.JJ.*), and an opinion was filed on March 31, 1965, reversing the order of the District Court, Moore, *C.J.*, dissenting. Thereafter, this Court, *sua sponte* on May 26, 1965, ordered *en banc* consideration of this case and six other cases. Upon such consideration, the order appealed from is affirmed.

Late on the night of August 23-24, 1961, Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island. His wife, Dr. Frances Behrendt, vainly coming to his assistance, was grievously wounded. The police, who quickly arrived on the scene as the result of a telephone call for medical aid which Mrs. Behrendt had managed to make, found many pieces of telltale evidence. They discovered a key chain with three keys, one of which was to Stovall's locker in a Brooklyn store where he worked. They also found a bloody shirt with the identification tag of a laundry used by Stovall. Further investigation in the morning of August 24th led the police to a bar which Stovall had visited the previous [fol. 49] night. This, in turn, brought them to a man whom Stovall had called by telephone from the bar; he supplied Stovall's name and the address of Stovall's sister in Hempstead, Long Island. Proceeding to this address around 4:00 P.M., the police found Stovall and also Dr. Behrendt's blood-stained white coat. They arrested him and seized the coat, a pair of trousers owned by Stovall which were stained with blood of Mrs. Behrendt's blood type, and his pork-pie hat. The shirt left in the Behrendt kitchen was similarly stained, but a piece torn from it, found under Dr. Behrendt's armpit, was colored with blood of the Doctor's type. At the trial, Stovall's sister and a male friend of the sister testified that when Stovall came to her room in Hempstead at about 12:30 A.M., August 24th, he was not wearing the white shirt he had

on earlier but instead appeared with the white jacket, bloody pants and a smear of blood on his forehead.

On the evening of August 24th, Stovall was questioned by the prosecutor at police headquarters; the statement was almost wholly exculpatory. The next morning he was arraigned, on a detective's charge of first degree murder, before a state district court judge. The judge informed Stovall, as required by § 188 of the New York Code of Criminal Procedure, "You have the right to the aid of a lawyer or counsel in every stage of the proceedings and before any further proceedings are had"; he then asked, "Do you want to get a lawyer?"; and said, "If you do, I'll give you time to get one before we proceed at this particular time." Stovall answered that he did, and on the Judge's further inquiry, "you're getting your own lawyer; is that right?", responded in the affirmative. The Judge then announced that he would "put it over to August 31st, next Thursday, for the purpose of getting an attorney," [fol. 50] and directed that Stovall be "remanded pending further pleading."

Since Stovall had to remain in police custody pending further proceedings on the adjourned date, he was taken for identification purposes to Mrs. Behrendt's hospital room where Mrs. Behrendt identified Stovall as her attacker. Thereafter he was lodged in jail. Stovall was convicted by the jury of murder in the first degree. The jury did not recommend leniency. Stovall was, therefore, sentenced to death.

The principal point now urged on appeal is the claim (not even presented to the court below) that the taking of Stovall to Mrs. Behrendt's hospital room for possible identification violated his Fifth, Sixth and Fourteenth Amendment rights. No claim is made—nor could any be sustained by the proof—that Stovall's arrest was without probable cause or that there was any delay in his arraignment which occurred the morning following his arrest.

Nor is any claim made that Stovall at any time made a confession or gave any statements which were obtained by coercion, trickery or subterfuge—in fact there were no statements or confessions whatsoever. Thus, the only issue upon this appeal is: can the police, following an arraign-

ment at which the person arraigned advised the court that he was going to get his own lawyer, continue their identification efforts by taking such person to the hospital room of the victim to ascertain whether or not she recognized him as her attacker? Obviously the victim of the crime, if he or she has had an opportunity to see the attacker at the time of the attack, is the person most likely to be able to confirm or refute the identity of the person arrested. Freedom or further detention may well come from a "yes" or "no" to the simple question: is this the man who attacked you?

[fol. 51]

Fifth Amendment

(Self-Incrimination)

Appellant challenges the admissibility in evidence of Mrs. Behrendt's hospital room identification. However, under section 393b, New York Code of Criminal Procedure, "a witness who has on a previous occasion identified such person may testify to such previous identification."

What was Stovall's status at the time he was taken to Mrs. Behrendt's hospital room? Because of appellant's present argument, the spotlight of inquiry must be focused sharply upon this single period of time. Stovall had just been arraigned and had advised the court that he wished to obtain his own counsel rather than accept court-appointed counsel. To give him adequate opportunity to do so, the court adjourned "any further proceedings" for six days for that purpose. No plea was entered, no motions had to be made or waived, no rights were jeopardized. In the meantime Stovall had to remain in the custody of the police. This was lawful custody. To fulfill properly their duty to make sure that they had the right man, it was incumbent upon the police to have the victim of the assault view the suspected attacker to identify or disavow him as the culprit.

Had Mrs. Behrendt not been so seriously injured and hospitalized, Stovall would have been lodged in the local jail and Mrs. Behrendt could have veiwed him in a line-up or looked at him through the door or gate of his cell. A

photograph of Stovall might have been taken and exhibited to her. However, the police have to deal with situations as they find them and act expeditiously in the light of emergencies which confront them. Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, "He is not the man" [fol. 52] could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible proeedure and took Stovall to the hospital room.[1] Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.

The hospital room identification [2] was not prejudicial to Stovall because Mrs. Behrendt, after she recovered, made positive identification in the courtroom. There is no evidence that her hospital room identification on August 25, 1961, affected or influenced in any way her courtroom identification on May 23, 1962. Any previous identification was but duplicative. She was the only living person who had seen her attacker. Stovall's counsel used his right of cross-examination to the fullest extent in questioning the identification and dwelt upon it in summation. Since the law requires the defendant to be present upon his trial and to exhibit his face for identification purposes, it was for the jury to weigh the accuracy of Mrs. Behrendt's identification.

As a matter of law, the method of identification inside or outside the courtroom would go to the weight to be attributed to the identification; not to the admissibility or

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[1] Undoubtedly, if the police had failed to take Stovall to the hospital and had lodged him immediately in jail and Mrs. Behrendt had died, some appellate counsel would now be urging the same acts as a ground for reversal, asserting that he had thus been deprived of a constitutional right.

[2] Voice identification was requested and Stovall complied but this form of identification was not used or referred to in the trial and, hence, is not an issue here.

constitutionality of testimony relating thereto, *People* v. *Partram*, 60 Cal. 2d 378, 384 P. 2d 1001 (1963), *cert.* [fol. 53] *denied*, 377 U.S. 945 (1964), (defendant forced to try on hat and coat which did not fit others in line-up); *People* v. *Clark*, 28 Ill. 2d 423, 192 N. E. 2d 851 (1963), (witness saw one of suspects in police station before line-up); *People* v. *Boney*, 28 Ill. 2d 505, 192 N. E. 2d 920 (1963), (wife raped; husband knew four of five in line-up were from State's Attorney office); *State* v. *Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *Redmen* v. *Commonwealth*, 321 S. W. 2d 397 (Ky. 1959), (claim that police pointed out suspect before line-up); *Commonwealth* v. *Downer*, 159 Pa. Super. 626, 49A 2d 516 (1946), (defendant alone shown to witness), although there are some decisions to the contrary, *People* v. *Conley*, 275 App. Div. 743, 87 N. Y. S. 2d 745 (1949), (defendant appeared alone and was forced to wear clothing corresponding to witness' earlier description); *Johnson* v. *State*, 44 Okla. Crim. 113, 279 Pac. 933 (1929) (only defendant produced).

Wigmore on Evidence, Vol. 8, 3d ed., § 2265, p. 374 has written:

> "Looking back at the history of the privilege [against compelled self-incrimination] (*ante*, § 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence."
>
> * * * *
>
> "In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in constitutional definitions, but *testimonial compulsion*." (italics in original) Thus
>
> "an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because [fol. 54] it does not call upon the accused as a witness, i.e., upon his testimonial responsibility."
>
> * * * *
>
> "What is obtained from the accused by such action is not testimony about his body, but his body itself (*ante*, § 1150). Unless some attempt is made to se-

cure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

The law has made and continues to make a definite distinction between testimonial evidence and identification. And for good reason. Physical characteristics such as facial features, color of hair and skin, height, weight and even manner of walk may be observed by all who may be present at the scene of a crime. A person does not become a witness against himself merely by possessing these individual characteristics. When it was discovered that the fingerprints of persons differed one from the other, this form of identification was added to the list of reliable distinguishing features which the police and the prosecution may, without violating the privilege, compel a defendant to reveal. Thus for generations it has been legal to require the accused to stand up in court for purposes of identification, *State* v. *Carcerano*, 238 Ore. 208, 390 F. 2d 923 (1964); *People* v. *Oliveria*, 127 Cal. 376, 59 Pac. 772 (1899). However, the opportunity for courtroom identification may well first be presented many months after the occurrence of the crime. Interests of the accused and society alike demand that this opportunity be afforded at the earliest possible moment. When this "moment" exists will of necessity be dependent upon the facts and circum- [fol. 55] stances of each particular case. No ironclad rules can be or should be laid down. But what better guides can there be than common sense?[3]

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[3] Kamisar, Criminal Justice in Our Time, Magna Charta Essays (University of Virginia Press 1965), pp. 9-10:

"Here misty ideals collide with the grim 'realities' of law enforcement. Here we are confronted, both with the Constitutional and normative levels, with the most important question, or cluster of questions, in the entire field of criminal procedure today.

"I am not talking about detention for such purposes as fingerprinting, placing in line-ups, confronting victims or witnesses and checking out alibis. Assuming the suspect has been lawfully arrested, such station house screening is both necessary and desirable."

Helpful guides to decision may be found in other cases, which involved federal prosecutions. Most recently (September 9, 1965) the Court of Appeals for the District of Columbia had to deal with an identification after arrest problem (*Kennedy* v. *United States*, Docket No. 19202, —— F. 2d ——). There police officers informed by radio of a crime arrived at the scene to find a man being forcibly restrained by two men who had heard womanly screams and had seen two men running from a house. The police took the man (Kennedy) into the house where they found two women handcuffed to a stair rail. The women identified Kennedy as one of their assailants. Upon the trial they identified the accused in open court and testified as to their prior identification even as did Mrs. Behrendt here. Upon appeal Kennedy's counsel urged that the complainants should not have been permitted to testify against him because the identification had derived (1) from an arrest without probable cause; (2) from an illegal detention; and (3) that his Sixth Amendment right to counsel had been infringed because he had been without counsel when identified at the scene of the robbery. The court found probable cause for the arrest and that "Appellant [fol. 56] [Kennedy] made no confession and there is nothing to suggest a police purpose to elicit a confession." The court noted, after finding that there was probable cause for the arrest, that it is a policeman's "function to try to minimize the incidence of erroneous detentions and charges; taking Appellant into the presence of the complaining witnesses was entirely appropriate. Had the officers not done this, Appellant would have been subjected to continued detention, a trip to the station, to booking and line-up processes, unnecessarily if the complainants had said he was not one of the attackers. The police should not have overlooked the possibility of his exoneration, which could be easily and swiftly resolved by 'quick verification' in a confrontation." —— F. 2d ——, ——.

In *Copeland* v. *United States*, 343 F..2d 287 (D.C. Cir. 1965), the appellant after arrest was taken by the police to the Western Union office where the robbery had occurred to be identified by one of the victims. Then taken to the

police station, he was identified there by a victim of a different and previous robbery. The conviction was affirmed.

In *Caldwell* v. *United States*, 338 F. 2d 385 (8 Cir. 1964), the accused had been put in a line-up and identified by eyewitnesses. The court held that there was no self-incrimination, saying at p. 389: "The mere viewing of a suspect under arrest by eyewitnesses does not violate his constitutional privilege because the prisoner is not required to be an unwilling witness against himself. There is a distinction between bodily view and requiring an accused to testify against himself." And in *People* v. *Gardner*, 144 N. Y. 119, 128 (1894) the New York Court of Appeals said: "A murderer may be forcibly taken before his dying victim for identification, and the dying declarations of his victim may then be proved upon his trial for his identification."

[fol. 57] The principle that an arrested person "may be exhibited for identification to the person injured by the commission of the crime," *Downs* v. *Swann*, 111 Md. 53, 61; 73 Atl. 653, 655 (1909) is so consistent with fundamental fairness both to the accused and society that there is little point in further elaboration except to take notice that the law sanctions many methods of identification which do not invade the field of testimonial compulsion such as the use of fingerprints and photographs, including photographs of body scars. See *Barletta* v. *McFeeley*, 107 N. J. Eq. 141, 152 Atl. 17 (1930); *People* v. *Smith*, 142 Cal. App. 2d 287, 298 P. 2d 540 (1956); *State* v. *Emerson*, 266 Minn. 221; 123 N. W. 2d 382 (1963); *O'Brien* v. *State*, 125 Ind. 38; 25 N. E. 137 (1890).

The accused may even be forced to perform some physical act such as putting on eyeglasses, *People* v. *Tomaszek*, 54 Ill. App. 2d 254, 204 N. E. 2d 30 (1964); submitting to a physical examination, *McFarland* v. *United States*, 150 F. 2d 593 (D. C. Cir. 1945); having a handkerchief put over his face to simulate his appearance at the time of the robbery, see *Ross* v. *State*, 204 Ind. 281, 182 N. E. 865 (1932) and *Key* v. *State*, 30 Okla. Crim. 92, 242 Pac. 582 (1925); or giving a blood sample. See also *Walton* v. *City of Roanoke*, 204 Va. 678, 133 S. E. 2d 315 (1963). In summary, as Mr. Justice Holmes said in *Holt* v. *United*

States, 218 U. S. 245 (1910), the prohibition of the Fifth Amendment "is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material" (at 252).

Fourteenth Amendment

(Due Process)

Since courtroom identification, which usually takes place many months after the occurrence of the crime, is permis- [fol. 58] sible, interests of the accused and society alike demand that the opportunity to identify be afforded at the earliest possible moment when the likelihood of an accurate identification is greatest. Of course, in the interests of truth and fairness to the suspect, this opportunity should be afforded, where possible, under circumstances most likely to lead to a disinterested decision by the identifier. When a proper moment exists will of necessity be dependent upon the facts and circumstances of each particular case. No ironclad rules can be or should be laid down. Although federal courts should be loath to interfere with state court evidentiary matters which go primarily to the weight of evidence admitted, it may be that an identification procedure could be so unfair as to amount to a violation of the Fourteenth Amendment's due process guarantee.

Here, however, defendant was not deprived of due process. A line-up was out of the question; a show-up could be conducted only where Mrs. Behrendt was then confined—the hospital. She had had more than a fleeting glimpse of the attacker. Although stabbed many times, she was not unconscious and the attacker had remained in full view in the brightly lighted kitchen for a considerable period of time after killing Dr. Behrendt and stabbing her. Upon the trial, there was no limitation to the cross-examination directed towards the weight of her hospital identification testimony. There is no basis for holding that Stovall was not accorded due process on his trial by the State of New York or that he was deprived of Fourteenth Amendment rights.

Sixth Amendment

(Right to Counsel)

Appellant's counsel now argues that at the time of arraignment "his [appellant's] constitutional right to coun-
[fol. 59] sel had come into being and that failure of the arraigning Magistrate to adequately advise the defendant resulted in the denial of the right." The charge of failure of duty against a judge warrants factual investigation. When Stovall was brought before the Magistrate on August 25th, he was advised of his right to counsel and was asked whether he had counsel or desired to secure his own counsel. He replied that he did so desire. To give him this opportunity, the Magistrate adjourned further proceedings until August 31st. On that day [August 31st], Stovall informed the Magistrate, in response to the question as to whether Stovall had obtained counsel, that he had not communicated with any relatives to see if they would get a lawyer for him, but that he had been told in the jail that "they" said one would be assigned. The Magistrate then again told Stovall of his rights, "the first of which is the right to the aid of a lawyer." Turning to a well-known criminal defense lawyer, the Magistrate asked, "Counsel George Mulry, would you be willing to help this man protect his rights in this Court at this time?" Counsel agreed. The court told Stovall to confer with him and that "He is a lawyer who will volunteer his services to help you now protect your rights." A short recess was declared after which, through counsel, Stovall demanded a hearing which the court set for the following day "so you [Stovall] could be confronted with the witness and the judge could decide whether or not a crime had been committed." However, on August 31st, Stovall was indicted for first degree murder by the grand jury and the case thereafter came under the jurisdiction of the County Court.

The New York Code of Criminal Procedure § 188 provides that the Magistrate inform the prisoner of "his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." He must "allow
[fol. 60] the defendant a reasonable time to send for coun-

sel, and adjourn the examination for that purpose." *Id.* § 189. The Magistrate followed this statute punctiliously. In the light of this record, the charge of failure to advise is completely unsupported by, and quite contrary to, the facts.

Appellant's reference (in his brief) to his situation as amounting to "the release of the accused to his accusers," is equally unwarranted. Stovall was not so released; he had been arrested by the police; was in their custody; and, because of his expression of desire to obtain his own counsel, would remain in their custody until further proceedings were held. While in such custody, the police could have brought in any potential witness for identification purposes, including the victim, except for the fact that she, seriously injured, could not be moved from the hospital room. The only variation because of the necessity of the situation was the hospital room identification instead of a police station identification.

The record completely refutes appellant's statement (in brief) that "from this denial of right [to counsel] (a premise which may be mildly described as inaccurate) the *prosecutor* was enabled to *create* evidence used to secure conviction at the subsequent trial" (italics in original). There was no denial of the right to counsel; the Magistrate in fact honored Stovall's request that he be permitted to obtain his own attorney. Nor did the continuation of police efforts to secure the best evidence of identification before Stovall had an opportunity to engage his own counsel result in any incriminating statements or confessions because he made none.

If Stovall had had counsel, what could counsel have done to thwart the identification? He could not have demanded Stovall's immediate release so that no one might see him. [fol. 61] He could not have arranged to have Stovall continuously wear a hood or mask over his face to avoid identification, nor could he have ordered the police forthwith to halt their identification activities. Counsel would not have said "Cease further efforts at identification; Stovall has admitted his guilt" because Stovall had not done so.

Again adverting to the opinion in *Kennedy, supra,* counsel could not have prevented the hospital room identification because "An accused has no right to be viewed in a line-up rather than singly." Here, as in *Kennedy,* counsel could not "have altered the course of events" as to identification, and since no confession or "any other evidence respecting which counsel could have rightfully advised Appellant to refuse to yield" was obtained, there was no deprivation of Sixth Amendment rights.

Lastly, appellant contends that he was denied a constitutionally adequate hearing on his motion to suppress. In the New York Court of Appeals to which an appeal from Stovall's conviction had been taken, the remittitur was amended to show that that Court had passed upon the contention that he had been convicted on evidence obtained by unlawful search and seizure. The Court held that his constitutional rights had not been violated (13 N. Y. 2d 1178; 248 N. Y. S. 2d 56).

The District Court was well aware of the arguments appellant now makes but found that the articles claimed to have been illegaly seized, namely, a white jacket, a pair of trousers and a hat, were not offered in evidence against Stovall by the People but were marked for identification by the defense. This action was entirely voluntary and must be attributed to defense strategy rather than a checkmate move because the District Attorney had announced at the opening of the trial that he would offer no items [fol. 62] obtained from the allegedly illegal search. Nor could the "poison fruit" doctrine have led to the arrest because there was more than ample evidence to establish an earlier and independent source of information. Furthermore, since, as the Court found, "The proof is convincing that the articles were voluntarily turned over to the police by the sister of Stovall" and were not used by the People, the conclusion that "The record establishes that no constitutional rights of defendant were violated" is sound.

Although a capital case requires the most careful scrutiny, these requirements have been met. The highest court of New York has reviewed his case (13 N. Y. 2d 1094; 246 N. Y. S. 2d 410); the District Court considered and

weighed the errors complained of, as has this Court. Upon the law and the facts, no infringement of any constitutional right is presented.

Affirmed.

LUMBARD, *Chief Judge* (with whom Judge Kaufman concurs), concurring:

I Concur.

I agree with my brother Moore that the hospital room show-up did not violate any of Stovall's constitutional rights. The police found Mrs. Behrendt grievously wounded and in a state of severe shock at about 1:00 A.M. on August 24. At that time, in an incomplete and somewhat confused statement made to a police officer before she was given medical treatment, Mrs. Behrendt indicated that she had seen her attacker. The police were not allowed to interview Mrs. Behrendt on August 24, the day of her extensive surgery, or to present Stovall to her for identification purposes. They were therefore fully [fol. 63] justified in continuing their investigation by bringing Stovall to the hospital at 1:00 P.M. on August 25, after Stovall's morning arraignment.

The type of emergency facing the police is relevant to the question of whether the show-up procedure was so unfair as to amount to a denial of due process. I agree with my brother Moore that the method of an identification normally goes to the weight of the evidence. Given the circumstances surrounding the identification, the full opportunity afforded defense counsel to cross-examine Mrs. Behrendt at trial, and the positive court room identification made by Mrs. Behrendt, I find no violation of Stovall's right to due process. Likewise, Stovall's Sixth Amendment right to counsel argument has no merit, particularly since counsel could have had little or no effect on what took place in the hospital room.[1] And I agree with the

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[1] Indeed, I wonder whether the right to counsel doctrines of *Escobedo* v. *Illinois* and *Massiah* v. *United States* apply to circumstances which do not ultimately involve a danger of self-incrimination. A person lawfully arrested and detained has no right to

majority's disposition of the Fifth Amendment claim.

Unlike my brother Friendly, I see no need to inquire into whether the police violated New York law when they failed to deliver Stovall to a sheriff immediately after arraignment. Whether or not there may have been tech- [fol. 64] nical violation of New York law is no grounds for reversal here. No objection was made to this procedure at trial. Therefore there was no need for the court to inquire into whether it was proper and appropriate for the police to retain custody of Stovall following his production before the district court judge. Nor is there a federal constitutional right to be committed to a sheriff rather than to the police pending arraignment. Since there was no due process violation in the hospital room identification, the police procedure violated none of Stovall's federal rights.

I differ with my brother Moore's discussion of the prejudicial error issue, although I agree that the use made of the hospital room identification at Stovall's trial did not amount to prejudicial error even if that identification procedure itself violated Stovall's rights.

The Supreme Court has prescribed a rigorous standard of prejudicial error when dealing with police activities that violate fundamental constitutional rights. See, e.g., *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *United States* v. *Guerra*, 334 F. 2d 138, 143-47 (2 Cir.), cert. denied, 379 U. S. 936 (1964). Assuming for the moment that the hospital room identification violated Stovall's constitu-

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have his lawyer present to supervise all his activities that come within the realm of prison or detention house administration. Likewise, I should think that the police can search the defendant and his effects in the absence of counsel. Only when police conduct threatens to violate a personal right of the defendant that retains vitality during detention—e.g., the privilege against self-incrimination—or when police practices unfairly prevent the defense attorney from preparing his case—a literal deprivation of the right to counsel—must a court interfere to guarantee that the right is properly preserved. Viewed in this light, common sense finds a clear distinction between the case supposed by Judge Friendly in his dissent, where counsel is excluded from a court room identification at trial, and the failure to appoint counsel to accompany an accused to a pretrial identification. Cf. *United States* v. *Cone*, —— F. 2d ——, n. 13 (2 Cir. 1965).

tional rights, testimony as to that identification at trial was reversible error if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U. S. at 86-87.

Mrs. Behrendt made a positive court room identification of Stovall, and she indicated that this identification was the product of her recollection of the night of the crime.[2] [fol. 65] It seems highly probable that the use made of the hospital room procedure at trial did not influence this court room identification.[3] Under these circumstances, the

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[2] Relevant portions of Mrs. Behrendt's direct testimony are as follows:

"Q. What did you observe or what did you hear from that point on? A. I saw he was tall and strong and medium color, a medium brown, and I saw his face clearly because I jumped at him head on, and then a moment later when he stabbed me I fell down and I was already on the floor when my husband—when I saw my husband dead . . .

"Q. Now, this man that you speak of, that you saw, did you ever see him before that night? A. No.

"Q. Have you ever seen him since? A. Yes.

"Q. Are you able to point out who he is? A. Yes.

"Q. Will you do so? A. This Negro sitting there (indicating).

"The Court: Indicating the defendant.

"A. (Continuing) In the light coat.

"The Court: Indicating the defendant.

"The Witness: What?

"The Court: Indicating the defendant, you say?

"The Witness: Yes.

"Q. Did you ever see him anywheres before you saw him here in court today? A. Yes, in the hospital.

"Q. Do you know who he was accompanied by at that time? A. By several detectives, I think.

"Q. Do you know approximately when this was with relation to the time that you went into the hospital? A. I'm not quite sure. It was a few days after the operation when I was fully conscious. [It was in fact one day.]"

This was the only reference in Mrs. Behrendt's testimony to the hospital room identification until defense counsel's thorough cross-examination on that subject.

[3] Mrs. Behrendt testified that she had not seen Stovall since the hospital room identification. Likewise, the prosecutor in his opening statement mentioned the existence of the hospital room incident but

impact of testimony as to the hospital room incident was cumulative.

Neverthless, there remains the possibility that Mrs. Behrendt's ability reliably to identify Stovall at trial was in fact psychologically colored by the impact of the previous confrontation in the hospital room. This "prejudice" does not depend upon whether there was testimony as to [fol. 66] the hospital room identification. And the only way to eliminate this aspect of prejudice would have been to exclude the hospital room identification *and* to prohibit Mrs. Behrendt from making any identification at trial. I am unwilling to hold that so broad an exclusionary rule should flow from a constitutionally infirm pre-trial identification because of the likelihood that an unbiased court room identification can still be made seems great and because eye witness evidence, despite its human frailties, plays a vital role in criminal prosecutions. I am particularly unwilling to exclude all identification in this case because Mrs. Behrendt's testimony seems reliable and because the alleged police improprieties were unintentional and technical. It was proper to admit this evidence and to allow the jury to weigh its reliability.

If Mrs. Behrendt should be permitted to make a court room identification, then use of the hospital room identification becomes cumulative and harmless. More significantly, it is *fairer* to Stovall to *permit* testimony and full cross-examination concerning the hospital room procedure because only then can the jury know that the unequivocal court room identification may be the product of previous police persuasion rather than an accurate recollection of the night of the crime. At Stovall's trial, these considerations are evident: outside of the prosecutor's opening address, the first mention of the hospital incident came

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he said that he could only speculate as to whether Mrs. Behrendt would be able to make a court room identification. Since Mrs. Behrendt was excluded from the court room (as a witness) when the incident was brought out during the cross-examination of two policemen, and since no mention was made of it during her direct testimony until after her court room identification, it seems doubtful that the use made of the hospital incident at trial colored her court room identification.

during the cross-examination of two policemen who accompanied Stovall to the hospital. And defense counsel concentrated heavily on this incident in his cross-examination of Mrs. Behrendt while the prosecutor only brought it out casually. Consequently, I conclude on the facts of this case that the use made of the hospital room identification not only was harmless error but indeed was the fairest method of handling Stovall's trial.

[fol. 67] FRIENDLY, *Circuit Judge*, with whom WATERMAN, *Circuit Judge*, joins (dissenting):

The facts giving rise to the issue here[1] were stated as follows in the panel opinion of March 31, 1965:

> Section 192 of New York's Code of Criminal Procedure prescribes, so far as here pertinent, that "If an adjournment be had for any cause, the magistrate must commit the defendant for examination," and § 193 adds that the commitment shall be to the sheriff, save in New York City where it is to be to the commissioner of correction. We were told at the argument that the sheriff of Nassau County does not have a representative available in the arraigning courts and that responsibility for placing committed defendants in his hands rests with the police. After the arraignment but apparently before Stovall was handed over to the sheriff, two detectives took him, handcuffed to one of them, to the hospital where Mrs. Behrendt had undergone extensive surgery, and into her room. Three high police officers and two prose-

[1] The statement of the majority that this claim was "not even presented to the court below" is not wholly accurate. As the panel opinion explained, it was raised in Stovall's hand-written petition but was not considered by Judge Wyatt since in the district court counsel had relied entirely on the point dealt with in the final paragraphs of this court's opinion. The panel opinion also noted that the Assistant District Attorney commendably had not relied on the failure of Stovall's counsel to argue the point to Judge Wyatt and sought disposition by us on the merits.

cutors were also there. One of the police officers asked Mrs. Behrendt whether Stovall was "the man"; she said he was. At some time one of the officers asked Stovall "to say a few words for voice identification"; he did—just what does not appear.

[fol. 68] The panel recognized that "the privilege [of the Fifth Amendment against self-incrimination] does not invest a defendant with immunity from exposing himself to identification, even if this includes some movement, such as going from the jail to the courtroom for trial or rising, if called upon . . . and it may well be argued that use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently from that of the arm muscles."[2] But this truism does not settle whether Stovall was deprived of his Sixth Amendment right to counsel; although the two rights often overlap, they are not congruent. No one would suppose, for example, that because the Fifth Amendment does not protect a defendant from being compelled to stand up in court and try on a garment found at the scene of the crime, the prosecutor could require defense counsel to absent himself during such an episode. It is beyond dispute that the preliminary hearing was part of a "criminal prosecution," that Stovall had become an "accused," and that he was thus entitled "to have the Assistance of Counsel for his defense." *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *White* v. *Maryland*, 373 U.S. 59 (1963). This distinguishes *Kennedy* v. *United States*, —— F. 2d —— (D. C. Cir. 1965), and other cases of identification during the investigative stage, on which the majority rely. I fail to understand why, in the interval between preliminary hearing and trial, a defendant is not entitled to the assistance of counsel when the state wishes to make use of him to obtain evidence that will have independent testimonial value—particularly when *Massiah* v. *United States*, 377 U. S. 201 (1964), has obliterated any distinction

[2] The reference to moving the arm muscles was followed by citation of Mr. Justice Holmes' well-known opinion in *Holt* v. *United States*, 218 U. S. 245, 252 (1910).

[fol. 69] between judicial and extra-judicial action by the police once the "criminal prosecution" has begun.[3]

The majority say that after Stovall's appearance before the state judge he "had to remain in police custody" and that his custody was lawful. I see no basis for these statements. New York properly recognizes that, after the preliminary hearing, the prisoner comes under a new legal regime and his lawful custodian is the sheriff, not the police; the only thing the police could properly do with Stovall at that time, see § 193 of the New York Code of Criminal Procedure, was to place him in the hands of the custodial authorities just as soon as possible. Those authorities would have been bound not only to prevent Stovall from removing himself but also to prevent his being removed or molested by anyone else. The assumption, implicit in the court's opinion, that such a prisoner is subject to the beck and call of the police is surely wrong, see [fol. 70] Judge Finletter's fine opinion in *Commonwealth* v. *Brines*, 29 Pa. Dist. 1091 (C. P. 1920). Once Stovall was in the sheriff's custody, the latter could not lawfully

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[3] I see no basis for Chief Judge Lumbard's "wonder whether the right to counsel doctrines of Escobedo v. Illinois and Massiah v. United States apply to circumstances which do not ultimately involve a danger of self-incrimination." Once it has been held, as these cases clearly did, that the Sixth Amendment may apply outside the courtroom and when, as in *Massiah*, the accused did not even know of the presence of the police or the prosecutor, I see no escape from the conclusion that, if the right has attached, the accused is entitled to the assistance of counsel when the prosecution attempts to use him as a means of procuring evidence to be offered at the trial. I cannot believe my brothers would go to the extent of saying that, after arraignment or indictment, counsel could be excluded while the defendant was being subjected to medical examination or blood or handwriting tests. If counsel cannot be excluded from such procedures, common sense does not supply me with a satisfactory answer why he can be barred from an identification which his client is compelled to attend—although no one would dream of excluding him from a less meaningful one in the courtroom; the argument that, although excluded from the former, he will have an opportunity to attack both identifications at trial, does not seem sufficient for preventing him from rendering all possible assistance to the accused before the witness' impression hardens. I fear that my brothers simply have not been able to adjust their sights to the Supreme Corut's new concept that the right to the assistance of counsel embraces activities outside the courtroom.

release him to the police without an order of the court; if the prosecution had sought such an order, counsel could have been appointed and the difficulty that has here arisen would have been avoided.[4]

Other arguments advanced by the majority are equally unconvincing. They say the police could have taken Stovall to the hospital for identification before arraignment despite the absence of counsel, so why not thereafter? But many things can be done in the absence of counsel in the investigative stage before the "criminal prosecution" begins, which cannot lawfully be done later, as *Massiah* v. *United States*, *supra*, plainly shows. The rhetorical question as to what counsel could have done was answered in the panel opinion many months ago:

> He might have persuaded the prosecutor, in the state's own interest, if not to forego the hospital identification, at least to assure conditions better designed to avoid suggestion. He might have persuaded the judge to direct that Stovall be immediately sent to and then kept in jail pending trial, or be put before Mrs. Behrendt only under fair conditions such as a line-up, or be accompained by counsel who might question her . . . . Or, as a last resort, he might have advised Stovall to refuse to go, or to remain silent if taken by force.

[fol. 71] The case thus bears no resemblance to the recent decision in *Rigney* v. *Hendricks*, —— F. 2d —— (3 Cir. 1965), with which I am in accord, where counsel were notified of the intention to place an accused prisoner in a line-up held under scrupulously fair conditions and with counsel present. We have been told in no uncertain terms that, in dealing with a capital charge, as Stovall's was at the time, we are not to speculate on whether prejudice resulted from the absence of counsel, *Hamilton* v. *Alabama*, *supra*, 368 U. S. at 55; here, as there, "the degree of prejudice can never be known."

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[4] It is unnecessary to decide in this case the manner and extent to which Stovall could have been exposed to viewing in the course of normal jail routine. Cf. *Morris* v. *Crumlish*, 239 F. Supp. 498, 499 (E. D. Pa. 1965).

My brothers also intimate that the police and the prosecutor were confronted with an emergency and that they may have thought the visit to the hospital to be in Stovall's own interest. The latter argument ignores the hugh amount of circumstantial identification the excellent police investigation had produced; moreover, if the state officials were motivated by such solicitude, the natural course would have been to ask Stovall whether he wanted to go. The emergency argument falls both on the facts and on the law. Grievous as Mrs. Behrendt's injuries had been, nothing in the record indicates that her life was any longer considered to be in peril when Stovall was brought before her; the presence of five police officers and prosecutors in her hospital room would argue to the contrary—and also tends to negate the suggestion that Stovall had to be brought in alone. If Mrs. Behrendt's condition had been as serious as my brothers suppose, nothing prevented the prosecutor from informing the state district judge at the preliminary hearing that Stovall had to be taken immediately before her, and suggesting that counsel be assigned forthwith for the limited purpose of advising him in that regard—rather than standing silent when Stovall told the [fol. 72] judge of his desire to have counsel and then carting him off to a confrontation by the victim which counsel might have done something to mitigate.

My brothers also assert that in any event admission of the hospital identification was cumulative and therefore not prejudicial to Stovall, although they do not altogether agree on the grounds. Addressing itself to this point the panel said:

> The statement was inculpatory on the central question of his presence on the occasion of the crime; indeed, Mrs. Behrendt's was the only identification that was testimonial rather than circumstantial, and the jury asked that all her testimony be reread. A claim of harmless error as to a conviction must surmount an exceedingly high hurdle, even on collateral attack, when the error was constitutional and the punishment is death. See *Bruno* v. *United States*, 308 U. S. 287 (1939); *Kotteakos* v. *United States*, 328 U. S. 750, 764-65 (1946); *Stewart* v. *United States*, 366

U. S. 1, 9-10 (1961); *Hamilton* v. *Alabama*, *supra*, 368 U. S. 52. The hurdle is too high for this case.

Despite the labored attempt to prove the contrary, the hospital identification, featured in the prosecutor's opening, must have had a far greater effect on the jury than the identification in court some months later; common sense supports Dean Wigmore's observation, "After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity." 4 Evidence § 1130 at 208 (3d ed. 1940). The self-created dilemma of the concurring opinion, that exclusion of the hospital identification would prevent identification at the trial, is illusory; exclusion of the former would [fol. 73] simply have required the prosecutor to rest on Mrs. Behrendt's memory of the night of the dreadful crime and on her courtroom identification. If, in this posture, defense counsel had brought out the hospital identification, as no experienced counsel would, he would have had only himself to blame.

Although there can assuredly be a waiver of the right to counsel between arraignment and trial, no one has seriously suggested that we could find that, when, without any previous discussion, this Negro, of low mental capacity, was taken to the hospital by a detective to whom he was handcuffed. I scarcely regard Stovall as a sympathetic character, and I am glad that the crime was recent enough to permit an effective retrial. But I continue to believe that, in the absence of overriding necessity or consent, a man who has been brought before a judge on a charge of a capital crime, and has expressed his desire for counsel, is entitled under the Constitution to be let alone until he gets one. That is all Judge Marshall and I decided last March, and I adhere to it.

SMITH, *Circuit Judge* (dissenting):

I dissent. I agree with Judge Friendly that "in the absence of overriding necessity or consent, a man who has been brought before a judge on a charge of a capital crime, and has expressed his desire for counsel, is entitled under the Constitution to be let alone until he gets one."

[fol. 74]

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES EX REL. THEODORE STOVALL,
RELATOR-APPELLANT

v.

WILFRED L. DENNO, as Warden of Sing Sing Prison,
Ossining, New York, RESPONDENT-APPELLEE

ORDER VACATING JUDGMENT OF MARCH 31, 1965—
January 31, 1966

A petition for rehearing in banc having been granted, additional briefs having been filed and the action having been taken under advisement without further oral argument,

Upon consideration thereof, it is

Ordered that the opinion of March 31, 1965 of a panel of this court and the judgment entered thereunder be and they hereby are vacated.

A. DANIEL FUSARO
Clerk

[fol. 75]

[File Endorsement Omitted]

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * * *

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES EX REL. THEODORE STOVALL,
RELATOR-APPELLANT

v.

WILFRED L. DENNO, as Warden of Sing Sing Prison,
Ossining, New York, RESPONDENT-APPELLEE

JUDGMENT—January 31, 1966

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

[fol. 77]

[File Endorsement Omitted]

[fol. 78]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. 1565 Misc., October Term, 1965

THEODORE STOVALL, PETITIONER

v.

WILFRED DENNO, WARDEN

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 20, 1966

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1436 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 231701 225

Office-Supreme Court, U.S.
FILED
MAY 18 1966
JOHN F. DAVIS, CLERK

PETITION NOT PRINTED

IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted]c. 254

THEODORE R. STOVALL,

Petitioner,

against

HON. WILFRED L. DENNO, as Warden of Sing Sing State Prison, Ossining, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM CAHN,
District Attorney, Nassau County,
Attorney for Respondent.

HENRY P. DEVINE,
Assistant District Attorney,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1965

No. Misc.

THEODORE R. STOVALL,

Petitioner,

against

HON. WILFRED L. DENNO, as Warden of Sing Sing State Prison, Ossining, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To:

The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States

The petitioner, Theodore R. Stovall, moves this Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York which denied an application for a writ of habeas corpus.

Theodore R. Stovall was indicted on August 31, 1961 by a Nassau County Grand Jury for Murder First Degree (two counts) as well as Attempted Murder First Degree.

The first count of Murder charged Stovall with killing Dr. Paul Behrendt by stabbing him to death with a knife during a burglary.

The second Murder count has reference to the same homicide, but the charge is styled in common law terms.

The third count has reference to the attempted murder of Dr. Frances Behrendt, the wife of the deceased, which occurred at the same time.

After a jury trial, Stovall was convicted in the Nassau County Court of Murder First Degree (Felony Murder) and Murder Second Degree under the common law charge, as well as Attempted Murder in the First Degree.

The death sentence was imposed on September 6, 1962 for Murder First Degree whereas, Stovall was sentenced to 40 years to life for Murder Second Degree and 12½ to 25 years for Attempted Murder First Degree with the direction that the last two sentences be served consecutively. Of course, Stovall's death sentence has been vacated because of the abolition of capital punishment in the State of New York.

The judgments of conviction were unanimously affirmed by the New York State Court of Appeals (13 N. Y. 2d 1094) except that the appeal relating to Murder Second Degree and Attempted Murder in the First Degree was dismissed as not properly before the Court.

The remittitur was amended to show that Stovall's constitutional rights had not been violated (13 N. Y. 2d 1178).

No application was ever made for a writ of certiorari.

Thereafter, an appeal was made in the United States District Court for the Southern District of New York for a writ of habeas corpus which application was denied by Judge Wyatt on July 14, 1964. The decision is not officially reported.

A timely application for a certificate of probable cause and leave to appeal as a poor person was granted on September 9, 1964 and a notice of appeal was filed on September 10, 1964.

On January 21, 1965 the Circuit Court reversed and directed a new trial. The panel decision is unreported.

The Court in banc vacated the panel decision and affirmed the District Court judgment dismissing the writ. The panel decision may be found at 355 F 2d 731.

Constitutional Provisions Involved

Dr. Paul Behrendt was murdered in his home in Garden City during the night of August 23, 1961. His wife, Frances, also a doctor, was nearly murdered by Stovall at the same time.

Stovall was arrested at 4 o'clock the afternoon of August 24, 1961 and was arraigned August 25, 1961 before the Magistrate charged with First Degree Murder for killing Dr. Paul Behrendt, at which time he was fully advised of his right to counsel and to a formal hearing.

Stovall advised the Court that he would retain counsel so the formal arraignment was adjourned to August 31, 1961 to permit Stovall to retain counsel of his own choosing.

Stovall was thereupon remanded into the custody of the Sheriff of Nassau County who had jurisdiction over the Nassau County Jail which was situated in East Meadow nearby. Transportation of the prisoner from the Arraignment Court to the Jail was the responsibility of the arresting Nassau County detective. On the way from the Court to the Nassau County Jail, the authorities stopped at the Mineola Hospital, some few blocks from the Court, where the prisoner was taken before Dr. Frances Behrendt in her hospital room for identification purposes.

Proof of this fact was established at the trial *without objection.* The lawfulness of this item of evidence was actually challenged for the first time before the United States Court of Appeals. It was there argued that the

Criminal Court proceedings had already commenced against Stovall and with this fact, his right to counsel became fixed so the show-up thereafter in the hospital room before Dr. Frances Behrendt interfered with Stovall's right to counsel. The argument is it was constitutionally wrong to permit Dr. Frances Behrendt to testify to the hospital room identification.

Specifically, the case calls up the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution insofar as they involve the right of an accused his right to counsel and his privilege not to incriminate himself.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. No. 1254(1).

The Evidence

Helen Sims (396, *et seq.*) was a switchboard operator in the Garden City Medical Center and, at about 12:45 A. M. she received a frantic call for help from Dr. Frances Behrendt who was screaming over the line, " 'Murder, murder, murder' " (400). Immediately, Mrs. Sims put a call through to Lieutenant Hausser of the Garden City Police Department.

Lieutenant Edwin F. Hausser (259, *et seq.*) is a twenty-nine year veteran of service with the municipal police force for Garden City. According to Lt. Hausser, he was on duty when he received a call from Mrs. Sims as a result of which he went to the Behrendt residence at 79 Pine Street in Garden City arriving at 12:55 (264). Lt. Hausser immediately surveyed the situation and to gain entrance was compelled to break his way into the premises, which he did, arriving in the kitchen.

According to the Lieutenant, he discovered the deceased, Dr. Paul Behrendt, lying dead on the kitchen floor. Immediately, he conducted a search of the premises and on the second floor he discovered the victim's wife, Dr. Frances Behrendt, in the upstairs bedroom, in an hysterical condition completely covered with blood.

It was the uncontradicted testimony of Lt. Hausser that a survey of the premises revealed that all of the doors were locked, but he discovered a break in the screen (266, 284, Peo.'s Ex. 5) and he also observed that a window had been pushed open (286, Peo.'s Ex. 5).

Continuing, Lt. Hausser described for the jury the death scene as follows: First, he observed a light on over the kitchen sink (327) and he also observed that a light was on in the cellar (331) and also that there were lights on in the dining room and in the hall (333).

Lastly, the witness noticed that in the deceased's hand as he laid on the floor dead, covered with blood, was the telephone receiver which, of course, was off the hook (300). This most dramatic scene was pictured in People's Exhibit 9.

In the meantime, and before any further search of the premises had been conducted, Lt. Hausser put a call through for a neighbor of Dr. Behrendt, a Dr. Foehr who arrived at the murder scene almost immediately.

Dr. Joseph E. Foehr (378, *et seq.*) was a friend of the deceased and according to the witness, he arrived at the scene of the murder shortly after 1:00 A. M. where he found Dr. Behrendt lying on the floor in the kitchen and he quickly determined that Dr. Paul Behrendt was dead. Immediately, he ran upstairs where he found Dr. Frances Behrendt in the bedroom hysterical and in a state of shock as a result of the terrible knife wounds and the huge loss of blood. According to Dr. Foehr, he diagnosed her condition as critical and immediately made the necessary

arrangements to have her transferred to the Nassau Hospital, which was in the adjoining community of Mineola.

Christian Siegmann (477, *et seq.*) was the next witness called by the prosecution and he was summoned for technical reasons, it appearing that he was a surveyor and he had prepared a floor plan of the death scene as well as the surrounding neighborhood and People's Exhibits 14 and 15, which fairly represented the inside of the Behrendt home, as well as the outside, were introduced into evidence through this witness.

The first really important witness called by the prosecution was Detective Fred Catapano (514, *et seq.*) who was a detective in the Nassau County Police Department. According to Detective Catapano, he arrived at the scene at about 2:00 A. M. and he immediately went into the kitchen where he observed the body of the deceased, as well as an overturned refrigerator. According to Detective Catapano, the kitchen was in a shambles (517).

Almost immediately, Detective Catapano was directed to canvass the neighborhood for the murderer and he did this continuously until about 5:30 A. M. when he returned to the scene of the stabbing. At this point he re-entered the kitchen and he observed that the overturned refrigerator had been righted and on the floor where the refrigerator had been, he noticed a ripped and bloody shirt. Inside the shirt was a key chain with three keys (518-519) which the witness recovered and immediately turned over to Detectives Stalter and Rofheart who, at this point, were jointly carrying the case (525).

The key to this case was the keys for it led the investigating authorities to the Abraham & Straus people where it was determined that the key in question belonged to a Theodore R. Stovall who was carried on their employment records as a resident of 111-10 141 Street, Jamaica 36, New York.

At this time the prosecution called John R. Randall (559, *et seq.*) who swore he was the head of the Record Section for Abraham Straus and he determined from the store employment records that on the evening of August 23-24, 1962, Theodore R. Stovall was an employee of the company and when hired he was assigned Locker 358 for which he received a key.[1]

The next witness called by the District Attorney was Arievenia Paschal (624, *et seq.*) who declared under oath that she was a friend of the defendant, Theodore R. Stovall, and from time to time she used to take his clothes to a Chinese laundry on Sutphin Boulevard, about five blocks from her home which was at 111-10 145th Street, Jamaica.

From the laundry mark found on the shirt on the kitchen floor, the police were led very quickly to Go Yee, who ran a Chinese laundry at 112-20 Sutphin Boulevard, Jamaica.[2] Mr. Yee was shown People's Exhibit 16, the bloody shirt, and he recognized the laundry mark as belonging to him and he also identified the Paschal woman as a customer.

In the meantime, while the police were following their leads, which more and more were pointing toward Theodore R. Stovall, Dr. Frances Behrendt had been moved to the Nassau Hospital where her life was saved by Dr. E. T. Montgomery, a friend.

Dr. Montgomery testified (726, *et seq.*) that he has been specializing in general surgery since 1936 and was at the

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[1] Key #358, which led the authorities through Abraham & Straus to Stovall was received into evidence later on in the trial when Detective Stalter testified that the defendant admitted the key was his (820).

[2] At the outset it was touch and go whether Go would be permitted to testify because of the confusion over whether he was to be sworn on a Bible or a chicken's head (652). The matter was resolved to the defendant's satisfaction and no question was raised on this appeal relating to Mr. Go Yee.

time retired Chief of Surgery at the Nassau Hospital and currently President of the Medical Board.

Dr. Montgomery found Dr. Behrendt in the emergency room when he arrived at the hospital at about 2:15 in the morning of August 24th. A brief examination revealed that she had been badly cut and was in very serious condition. Dr. Montgomery described the result of his examination thusly (734-737):

> "Q. All right, just tell us what you observed. A. Well, she was bleeding from multiple wounds. She was in shock, rapid pulse with a low blood pressure. Her skin was cold and clammy. She was conscious but very visibly frightened and anxious.
>
> Q. Did you treat her? A. I did.
>
> Q. Will you describe, please, what you did. A. At the time I saw her in the emergency room the treatment had already started. They were giving her an intravenous solution of dextran, which is a substitute for blood. She was then ordered to have blood transfusions because she had lost blood. We examined her as well as we could in the emergency room, determining that she was losing more blood and ordered her to the operating room as quickly as we could.
>
> Q. And what happened there, Doctor? A. Well, she had lacerations of the body.
>
> Q. Did you then examine her completely? A. Yes.
>
> Q. All right. Would you be good enough then to tell this jury what injuries, if any, you observed. A. She had seven lacerations on her body, one on the right back part of her scalp, several on her shoulder, arm, a long six-or-seven-inch laceration right down to the ribs on the right side under her right shoulder blade. She had another laceration on her left side, which had penetrated the chest cavity. She also had another small laceration up in the abdomen up underneath her ribs just to the left of the center of the body. There were, I think, seven lacerations in all, one of which was bleeding rather profusely, the long one back here (indicating) which had gone right through the muscles.

Q. Did you operate? A. Yes. We cleaned all these wounds up and then proceeded to sew up the lacerations. The one in the chest cavity was rather small. Dr. Mangiardi, a specialist in thoracic surgery, came in to help because of this laceration which had penetrated her left chest cavity and he put a tube into the chest cavities through the ribs in order to release air that had accumulated there. We probed the small laceration of the abdomen."

The defense reserved their right to cross-examine Dr. Montgomery for later in the trial and they exercised their privilege near the end (2613, *et seq.*). At this time, the Doctor corrected his testimony on direct wherein he noted that there were six or seven lacerations on Mrs. Behrendt's body and he changed this to eleven (613-614).

The Doctor's testimony regarding the severity of the wounds suffered by Dr. Behrendt was developed in very great detail on cross-examination (2615-2706) which proves that Mrs. Behrendt was stabbed both from the front and the rear. Further, that at least two of the stab wounds were critical; one in the abdomen and the other below the right shoulder blade, both of which severed arteries causing severe internal bleeding in the case of the stomach wound and external bleeding from the right shoulder injury.

In the Doctor's opinion the injuries could have been caused by a knife.

Coincidentally, with all of this, a young patrolman in the Garden City Police Department was driving his prowl car in the general area and at about 6:50 in the morning at a point one block north of the murder scene, he noted on the shoulder of the road an umbrella. As everyone should know, the Village Fathers in Garden City keeps their community spic and span and they don't tolerate umbrellas being left lying around on the side of the road. Accordingly, Patrolman Gebhardt stopped his car, picked up the umbrella and believing that it might have some bearing on the mur-

der, he drove immediately to the Behrendt house where he handed the umbrella to Detective Stalter.

One of the more important witnesses summoned by the People was Boyden Stalter (783, *et seq.*) of the Nassau County Police Department. Detective Stalter testified that on the night of August 24th he was attached to the Third Squad and he arrived at the Behrendt home at about 1:15 where he met Lieutenant Hausser of the Garden City Police Department.

Detective Stalter went immediately into the kitchen where he found Dr. Behrendt lying dead on the kitchen floor in a pool of blood with the telephone receiver lying across the upper chest or throat portion of the victim (784-786). Detective Stalter corroborated Lieutenant Hauser and Detective Catapano regarding the kitchen scene (*supra*).

Realizing immediately that he could do nothing for Dr. Paul Behrendt, he went upstairs where he found the victim's wife, Dr. Frances Behrendt, also in a large pool of blood. According to the Detective, Dr. Frances Behrendt was conscious at the time so he attempted to question her. Also and at the same time, he called to Detective Archer, who was still downstairs, who called for additional assistance.

Detective Stalter, during his search of the premises, testified that he observed a knife handle with a broken blade on the table in the dining room and a blade with no handle on the kitchen floor lying in a pool of blood (799).

The next most important fact testified to by Detective Stalter has reference to his confrontation with the defendant at police headquarters late on the afternoon of August 24th when he showed him the umbrella and the keys and the defendant admitted they belonged to him. According to Detective Stalter, the defendant said one of the keys was for his locker at Abraham & Straus and the remaining two

were for the front and back doors respectively of his residence at 110-10 145th Street, Jamaica.

Two days later, which would be August 26th, Detective Stalter went to Jamaica where he tried out the keys and he found that they did, in fact, open Stovall's front and back doors, and he also went on into Brooklyn to the Abraham & Straus Department Store where he found that the third key opened Stovall's locker which was #358.

Following Detective Stalter to the stand was Dolores Ramos (1259, *et seq.*), a technical witness, called by the prosecution to identify the white jacket beloning to the deceased (Peo.'s Ex. 30). The Ramos girl testified that she was employed by the Professional Linen Service and Dr. Behrendt was a customer and she wrote Dr. Behrendt's name in People's Exhibit 30 for identification purposes in connection with her work.

Jose Diz (1421, *et seq.*) was a driver for the Professional Linen Service and he testified that he recognized People's Exhibit 30 as one of his products which he delivered to the deceased.

The next most important witness called by the authorities was Captain William Hynes of the Detective Division of the Nassau County Police Department. Captain Hynes has been a member of the force for thirty-five years and on the afternoon of August 24, 1961, at about 4 o'clock, he proceeded to 85 Wellington Road, Hempstead, a village immediately south of Garden City. The premises were occupied by Shirley Stovall Brown, a sister of the defendant. According to Captain Hynes, he was accompanied by Inspector Lada and Lieutenant Tuthill. Hynes went to the rear door and Inspector Lada and Lt. Tuthill to the front door and all three were led into the premises without objection by Shirley Stovall Brown.

Captain Hynes testified that he inquired about her brother "Teddy Bear" and Shirley Stovall Brown told them he was in an upstairs bedroom and she took them all upstairs where she identified her brother (1269-1271) who was immediately placed under arrest by Inspector Lada.

Simultaneous with the arrest of the defendant by Inspector Lada, Captain Hynes seized a white jacket from the clothes closet in the room as well as a pair of men's black trousers that were lying on the floor and also a pork pie hat (1281-1364).

Captain Hynes concluded his testimony with the information that he turned over the white jacket, as well as the hat and trousers to Detective Rieder of the Technical Research Bureau of the Nassau County Police Department (1365-1368).

The People next called Vincent G. Thornton (1427, *et seq.*), Deputy Chief Inspector, who was the commanding officer of the Identification Bureau of the Nassau County Police Department. According to Chief Thornton, he arrived at the death scene in the early morning hours of the 24th and he secured the telephone, the knife handle and blade, as well as the torn shirt and he processed everything except the shirt for fingerprints. Chief Thornton testified the tests were inconclusive so then turned the exhibits over to Detective Rieder.

Following Chief Thornton was Dr. Leslie Lukash (1551, *et seq.*) who is the Chief Medical Examiner for Nassau County. Dr. Lukash declared that he performed the autopsy on the victim and he described his findings thusly (1560-1571):

> "Q. All right. Now, will you be good enough to explain to this jury just what injuries if any, you found upon autopsying this body? A. Yes. We removed Dr. Behrendt to the morgue and made an examination of the body. And as I said there were two major wounds, one over the left upper chest and

one over the left lateral chest. In addition there were other superficial linear abrasions not penetrating the skin. The one knife wound was present over the left clavicle and extended downward in a downward, inward and medial direction penetrating the breast plate, crossing over the middle portion of the chest or the mediasternum, the medical terminology, and lacerated the right lung. This extended for a distance of approximately six inches.

The other major wound was present over the left lateral chest and this was a gaping-type wound measuring approximately 4 by 1½ inches and it penetrated through the fat fracturing the four, five and six ribs, again went in an inward, medial direction and slightly downward, cut the front and back part of the heart, cut the diaphragm, severed the front portion of the stomach and lacerated the uppermost portion of the liver. And this knife wound was again approximately 6 to 6½ inches in depth.

There was a superficial abrasion over the right forearm. This was a linear type abrasion, almost scratch mark in appearance, and there was another very superficial abrasion linear in characteristics over the right chest.

He also had a very superficial wound of the skin over the left abdomen. Dr. Behrendt had these two major knife wounds of the chest. The death resulted from massive hemorrhage, and his left pleura cavity had over a quart and a half of blood and his right pleura cavity had approximately 400 cc. of blood. These were the major wounds of the deceased.

We did examine all organs. We examined his brain, we sent tissues away for histological studies and we sent tissue away for toxological examination.

The death as I said resulted from hemorrhage from penetrating knife wounds of the chest, heart and lungs, lacerating the stomach and the liver.

Q. Now, these two penetrating knife wounds that you have described, can you state whether either one of them would be a competent and producing cause of death? A. Either one could be a competent producing cause of death, but there is no question that one could cause instantaneous death whereas the other would not.

Q. Now, which of these two knife wounds, Doctor, would cause instantaneous death? A. The knife wound in the left lateral chest that severed the four ribs and cut the anterior and posterior or front and back part of the heart.

Q. These parts were actually cut? A. Severed, yes, just sliced through.

Q. Of the heart itself? A. Of the heart itself.

Q. Now, Doctor, this wound that you have just described now, you followed the path of that particular knife wound, did you? A. Yes, I did.

Mr. Spitzer: Would the court attendant please stand.

Q. Will you describe for this jury the path of this wound on the court attendant? A. The wound was a gaping wound of the skin which measured approximately four by one and a half inches and was located approximately in this area (indicating). The fourth, fifth and sixth ribs were cut through.

Q. Where would that approximately be? A. Right approximately here (indicating). And the path of the knife went in this direction cutting the front and back part of the heart, slicing it through, lacerating the diaphragm that lies just beneath the heart, cutting the stomach which lies in close proximity to the diaphragm and then cutting the upper surface of the liver which again lies contiguous with the diaphragm.

Q. Where approximately would the liver be located? A. The liver would be approximately here, going from here, but it is the left portion of the liver that was lacerated (indicating).

Q. Would that blow require a light or a forceful thrust? A. This would require a considerable force and I would say a considerably strong forceful thrust.

Q. These ribs that were severed, you say the fourth, fifth and sixth? A. They were cut right through, yes.

Q. Of what material do these ribs consist of? A. Bone.

Q. And the bone was cut right through? A. Cut right through.

Q. Now, with respect to the other penetrating wound, would you be good enough, Doctor, to demon-

strate where that was? A. This is the left clavicle and the other wound was present just above the left clavicle and it likewise went in a downward, inward direction and crossed this path from left to right in a downward direction cutting through the upper part of the breastplate, cutting across the middle portion of the chest and then lacerating the right lung in its most upper portion.

Q. Where, approximately, is the right lung? A. Right approximately here (indicating). And this knife wound went in this direction (indicating). Both wounds went from a left to a right direction in a downward, inward path.

Q. Now, that particular wound that you have just described, would that be produced by a light or a heavy thrust? A. Heavy thrust. This wound or this knife went through the breastplate, the upper portion of the breastplate, which again consists of cartilage and bone and it was an injury of considerable force in order to cut through the bone.

Q. This breastplate that was penetrated consists of bone and cartilage? A. That's correct.

Q. And this knife went right through it? A. It went right through it.

Q. Doctor, I show you the blade on People's Exhibit 23 and the handle with the stub of a blade which is People's Exhibit 22, both for identification, and ask you whether that blade in your opinion would be a competent, producing cause of the injuries that you found? A. Yes, this knife could produce the wounds.

Q. Doctor, I show you this photograph, People's Exhibit 9 in evidence, and ask you whether you recognize the body shown on that picture? A. Yes, I do.

Q. Who is that? A. This is Dr. Behrendt lying on the kitchen floor as I saw it when I arrived at the scene.

Q. Is this the body on which you performed the autopsy? A. That's correct."

Of particular importance to the investigation was the discovery by Dr. Lucash in the Meadowbrook Hospital of a piece of shirt lodged in the armpit of the deceased which was immediately turned over to Inspector Carpenter and

Detective Rieder of the Technical Research Bureau, both of whom were present.

Detective Robert B. Rofheart (1702) is a veteran member of the Detective Division of the Nassau County Police Department and a member of the Homicide Squad at the time of the murder. On the date of the trial Detective Rofheart had retired. Detective Rofheart's testimony corroborates that Detective Catapano, as well as the other police officers, who testified regarding the murder scene.

The main thrust of Detective Rofheart's testimony is to the effect that the defendant admitted the keys found at the scene were his although the defendant steadfastly denied killing the victim (1706-1707). According to Detective Rofheart, Stovall maintained throughout the questioning that he was at his sister's house on Wellington Road in Hempstead, throughout the whole of the evening in question (1707-1708).

Cross-Examination

During the cross-examination Detective Rofheart was questioned about his visit to the Hospital to confront Mrs. Behrendt with the defendant. The nub of the detective's testimony *as brought out on cross-examination* is that Mrs. Behrendt identified the defendant as the man who attacked her husband and herself and whom she met face to face in the kitchen of their home on the fateful night (1803-1807).

The cross-examination of Detective Rofheart is also notable for many other things including the first mention before the trial jury of one of the most important clues which led the police to the defendant and which ultimately singled out Stovall as the killer.

At about 8 o'clock on the morning of August 24th, Detective Rofheart received a telephone call from a young fellow, who wished to remain anonymous, who reported that

on the previous night someone, who later turns out to be identified as the defendant, made a telephone call from the Oasis Bar and he had a distinct recollection of the number which he gave to Detective Rofheart (1835-1836).

According to Detective Rofheart, he immediately called the number which turned up Walter Girodeau who admitted that on the previous night, about 10:30, he had received a telephone call from the defendant, Stovall, and he told Detective Rofheart that Stovall lived in Jamaica and he had a sister in Hempstead and he gave the detective both addresses (1840, 1857-1859).

Charlie Rice (1863, *et seq.*) was the owner and landlord of the premises at 111-10 145th Street, Jamaica, which he occupied. Rice testified that he rented the basement to the defendant and that he gave him keys to the front and back doors of the premises.

The next witness was Rosier Brown (1908, *et seq.*), the boy friend of Shirley Stovall, the defendant's sister. According to Brown, on the night of August 23rd, he went to visit his girl friend who lived at 85 Wellington Street, Hempstead, and he arrived at about 7:30 or 8 o'clock.

From the witness' testimony, it would appear that the premises is a rooming house and Miss Stovall occupied at least one of three of the upstairs rooms. According to Brown, the defendant arrived at about 9 o'clock and they drank some Christian Brothers Brandy, after which the defendant left to return to Jamaica on the 11 o'clock train.

Insofar as the defendant was concerned, Brown declared that he was wearing dark pants, a white shirt, hat and shoes and he was carrying an umbrella when he left (1913-1917). Thereafter, Brown decided to stay over so he went to bed and so did Miss Stovall. All of a sudden, at about 1 o'clock, the defendant returned to the one-room residence of his sister, Miss Stovall, without the umbrella or his white shirt.

According to Brown, the defendant was wearing a white coat, which he compared to the white coats worn by doctors, and the defendant's trousers, socks and shoes were all bloodstained. In fact, Brown testified that the defendant had blood on his face and arm, which the defendant tried to wipe off, and failing this, sister Shirley pitched in to help clean him up.

Of course, the bizarre impression created by "Teddy Bear" literally covered with blood and wearing a white doctor's coat in place of his own dress shirt, undoubtedly aroused the curiosity of both Miss Stovall and Mr. Brown so that they got out of bed to question the defendant and this is what Brown told the jury that Stovall said (1923-1928):

> "Q. Did you have some talk with him? A. Yes.
>
> Q. Did you do anything with him? Just explain what went on from that point on. A. Yes. We had asked him what happened, where he had been. So he started telling us about—he says, 'You won't believe this. It was the worstest dream I ever had in my life.'
>
> He started talking about a dream, and so we asked him what happened. And he said he went to the train station and—let's see—he started to the train station, I think, and he saw a man or met a man or something. Anyway, the next thing you know, he was in the train station and he was on a train, and he said it seemed like the train disappeared and then he was in a car or something, he was in a car, and the car stopped, and everything—it was all confusing—couldn't make no sense out of first. So I told him, 'Look, if you lay down maybe tomorrow morning when you wake up you can tell us what happened.'
>
> Q. Yes, what did he tell you? A. The next morning he woke up it was the same thing again. So he said he thought he heard—he was walking down the street or going down the street and he thought he heard a woman holler, a woman screaming, and the way he was talking, you know, you could tell it sounded like it was all confusion. You couldn't make heads or tails of what he was saying at first. And

then he said something like he heard a woman screaming and he said he ran in this house and there was a man laying there in a pool of blood. And so we said 'A man in a pool of blood?' He said, 'Yeah, I never seen so much blood.' And then a lady was screaming and hollering. He said she said something to him and he said he told her, 'Lady, you can't hurt me. I'm here to help you. I'm here to help you. I'm here to help you. The Lord won't let you hurt me.'

Q. The who? A. 'The Lord won't let me hurt you. I'm here to help you.' And that's all he remembered until he was home. That's as much as he said.

Q. Well, did he tell you whether he had gone any place after he left your house and before he went to, as you put it, the train station? A. Yes, he said he stopped by the bar and he had a beer.

Q. Did he tell you where the bar was located? A. No, but I presume it was—

Q. No, never mind what you presume. Did he tell you where it was located? A. No.

Q. Did either you or Shirley in your presence ask him where he had gotten the jacket? A. Yes.

Q. What did he say? A. He doesn't seem to know. He just said—at first he looked down at himself like this (indicating). He said 'Jacket?' He said, 'Where is my shirt?' Like that, as if he didn't even know he had the jacket.

Q. Did he at any time tell you where he had gotten the jacket or how he got in possession of the jacket? A. No, he just seemed to think—he actually doesn't know how he got the jacket. All I know he looked down and the jacket was on. He had the jacket on."

At the time of the trial, Mr. Brown and Miss Stovall apparently were husband and wife and admittedly, Mr. Brown would very much like everything to come out all right for his new brother-in-law, Theodore Roosevelt Stovall (1970-1971). Nevertheless, Brown testified the defendant was not drunk when he came to the apartment at 9 o'clock (2005-2031) and when defendant left the apartment at 11 o'clock, he was a little high but "he wasn't high like he usually gets high when he drinks whiskey" (2035).

Continuing, the defendant's brother-in-law testified that when the defendant returned for a second time at about 1 o'clock he looked "about the same" (2039).

The Eye Witness

The most important identifying circumstances in the case was probably the testimony of Dr. Frances Behrendt (2045, *et seq.*) who, of course, met the defendant face to face in the kitchen of her home. According to Dr. Behrendt, her residence was closed up for the night (2050-2051) and she went to bed while her husband stayed up to hear the late news. At about 12 o'clock she was awakened by a noise and she spoke to her husband who went downstairs, after which she also went downstairs. Reaching the foot of the stairs, Dr. Behrendt testified that she observed the kitchen was lit up and she also saw the defendant and her husband in the kitchen facing each other.

In a nutshell, Mrs. Behrendt testified that the defendant had a knife and was about to stab her husband who had a telephone in his hand, (2057-2058). At this point, Mrs. Behrendt declared that she jumped on the defendant and struggled with him as a result of which she was stabbed in the abdomen and fell to the floor critically wounded (2059). Her next recollected fact is that she saw her husband lying dead on the floor with the telephone in his hand. At this point, the defendant came back to Mrs. Behrendt and began to stab her in the back while she was lying helpless on the floor.

According to Mrs. Behrendt, the defendant also tipped over the refrigerator which fell to the floor narrowly missing her (2063). Mrs. Behrendt declared that she had a good look at the killer in the kitchen, which was well lit up, and heard him talk and she identified the defendant as the man who killed her husband and tried to kill her.

On cross-examination, Dr. Behrendt admitted that she didn't know if the defendant had a hat on or wore gloves, but she believes that he was wearing a light colored shirt (2130-2133). Also, Dr. Behrendt testified that she had scheduled a stomach examination for a patient for the following morning, which would be August 24th and her husband, as was his custom in such case, would not leave his white jacket in their office, which they shared, but he hung it on the chair in the dining room so that he wouldn't have to disturb the patient during the examination (2134-2136).

The principal technical witness called by the People was Detective Eugene Reider (815, *et seq.*) who testified in effect that he went to the murder scene on the morning in question and he recovered what later proved to be the defendant's shirt from Detective Catapano who found it at the scene and he tested the shirt and discovered that it was covered with human blood—group A (2453-2460).

People's Exhibit 40 was the piece of cloth recovered by the Medical Examiner, Dr. Lukash, during the autopsy from under the armpit of the deceased and with reference to this exhibit, Detective Reider tested it and concluded that it also contained human blood—group B, and that the blood of the deceased was group B (2466-2467). Detective Rieder also testified that he concluded from a microscopic examination that the piece of cloth discovered in the armpit of the deceased by Dr. Lukash had, in fact, been torn from the shirt found on the floor at the murder scene (2468).

People's Exhibit 21 was the tee shirt or undershirt found at the scene by Chief Thornton and this exhibit was tested by Detective Reider who found that it contained human blood—group A (2478-2479).

People's Exhibit 31 was the defendant's black trousers seized by Captain Hynes incidental to the arrest of the defendant in his sister's home at 85 Wellington Road, Hempstead, According to Detective Reider they were covered with blood—group A (2492).

People's Exhibit 30, which would be the Doctor's white coat belonging to the deceased, was checked and found to contain blood stains, but they were insufficient for grouping (2498).

The same conclusion was reached with regard to the defendant's pork pie hat (2505).

The same deduction was drawn from the results of the tests of the defendant's shoes which were found to contain human blood but inadequate for grouping.

People's Exhibits 22 and 23 were the knife handle and blade found on the table and kitchen floor respectively at the murder scene which Reider determined microscopically went together. The witness also concluded that human blood—Group B was on the blade and human blood was on the handle, but it was insufficient for grouping.

According to Detective Rieder, the blood on the kitchen floor where the broken blade was found was Group B (2555) and the cane found at the murder scene contained human blood—Group B, as well as a piece of screen found on the floor which had been cut and torn away (2579-2595).

The witness also checked the broken panes of glass on the porch where he had concluded they were pushed out from the inside as in the case of someone breaking out, and Detective Rieder concluded the broken panes contained human blood but they were too small to type.

The witness also checked Mrs. Behrendt's bedroom and found it covered with human blood—Group A (2717), as was the hallway leading to the bedroom and also the inside of the bathroom (2726-2733).

Human blood—Group A was also discovered on a man's slipper recovered from the kitchen floor and it was also found on the top of both sides of the overturned refrigerator, as well as on the kitchen cabinets and the chair (2744-2745).

Human blood—Group B on the other hand, was found in the area of the kitchen floor where the deceased was found and also on the cabinets directly at the point on the floor where the deceased was discovered (2748).

Detective Rieder also testified that he was at the autopsy and he took scraping from the fingernails of the deceased which proved to be negative.

According to the Detective, he also tested the clothes, such as they were, that the deceased was wearing and they proved to be stained with human blood—Group B (2783).

The witness also took scrapings from the defendant's fingernails at Police Headquarters, but he found no hairs, fibers or tissue, but all ten fingernails contained blood in quantities insufficient for grouping (2785).

The defendant's clothing at the time of the arrest had no blood stains (2787).

According to Detective Rieder, the deceased's blood was Group B and Mrs. Behrendt is Group A.

Rene Girodias was a neighbor of the victim and he was called to prove that he heard the murder even though he didn't recognize it and he called the police and finally, he testified that he saw someone leaving the area in a white coat.

The Bartender

James Joseph McGuire (3018, *et seq.*), was the bartender at the Oasis Bar and Grill, 433 Clinton Road, Hempstead, and one of the more important witnesses in the case. Mr. McGuire testified in substance that on the evening of August 23, 1961, the defendant first came into the bar for a drink and to make a telephone call. It was the opinion of Mr. McGuire that the defendant was not drunk but there seemed to be something wrong with Stovall which he equated with drugs.

McGuire's relevant testimony is as follows (3023-3035):

"Q. And what conversation if any did you have with him at that time? A. When he came in he went to the telephone booth and made a telephone call and he came out—when he first came in he said, 'How come nobody talks to me when I ask questions?'

I said, 'They are looking at television. Nobody is bothering with you.'

Q. Said what? A. 'Everybody is looking at television and nobody's bothering you.' He came out of the telephone booth and he said he wanted a cup of coffee. He said, 'I don't want that in a cup.' Then he said, 'Can you get me a cab?'

The Court: He wanted a what?

A. (Continuing) A cab. I called a taxicab. He said, 'I don't want the coffee in a cup. I wanted it in a container, I'm going to take it with me.'

He said, 'Give me my change,' I said, 'You didn't give me any money.' He said, 'I give you money, give me my change.'

I said, 'You had better get your cab and there is a cab now,' and he walked out. And as he walked out I saw this big umbrella. I saw it in the telephone booth and I took it and gave it to him and he took off.

Q. Well, how about the coffee? What if anything did you do about the coffee? A. He took the coffee with him. We had an argument over the price. I mean, he wanted change. He said he gave me money.

Q. Did you give him coffee? A. Yes.

Q. In a container? A. That's right.

Q. And he went out. And what about the umbrella, what did you do about the umbrella? A. I ran to the door and I said, 'Here's your umbrella.' I said, 'Here's your umbrella, Johnny.'

He said, 'Don't you call me Johnny. My name is Teddy.'

Q. I can't hear you. A. He said, 'Don't you call me Johnny. My name is Teddy.'

Q. That is this defendant here who was talking? A. That's right.

Q. And what happened after you gave him the umbrella outside? A. He went out and got in the cab.

Q. Did you see him again? A. I saw him about fifteen, twenty minutes later passing the place.

Q. Was he passing on foot or in a cab or what? A. On foot. He was walking.

Q. Now, you say that when he went in that telephone booth you say he made a telephone call; is that what you say? A. That's right.

Q. And could you hear any of the conversation? A. No, I couldn't, but he came out and he had a piece of paper with an address on it and come out and wanted to know how he could get to that address, someplace in Uniondale.

Q. He asked you how he could get to this address in Uniondale? A. That's right.

Q. What did you say? A. I tried to explain to him. Another couple of fellows and I tried to tell him how to get there but he was all jumbled up and he just didn't say any more about it. Then I gave him the umbrella and I saw this piece of paper in the telephone booth with a number on it.

Q. Well, we will get to that in a minute. Now, when you spoke to him about how to get to this address in Uniondale, will you explain to us how you came to call a cab. Did he ask for it or did you suggest it? A. No, he asked me to call a cab for him.

Q. You called the cab? A. Yes.

Q. What cab did you call? A. Larry's Cab in Hempstead.

Q. Larry's Cab in Hempstead? A. That's right.

Q. Now you started telling us that you found a slip of paper in the telephone booth after he left, is that correct? A. That's right.

Q. And did you see what was written on that slip? A. Telephone number.

Q. Do you remember what the telephone number was? A. No, I do not.

Q. What did you do with that slip of paper? A. I put it on the back bar for a while and I finally put it in my pocket and took it home with me.

Q. Were you contacted by the police at any time? A. No, none whatsoever.

Q. Well, I mean did there come a time when you did something with this telephone number? A. Well, who's his name came over that night when I went to work, a detective came over and brought me back to identify him.

Q. Well, I mean, did you keep that telephone number to yourself or did you give it to somebody? A. I gave it to the police. They called me up in the morning, early in the morning, half past 8 in the morning. I gave it over the telephone.

Q. Now after you last saw this defendant you say about 15 minutes after he got into the taxicab did you ever see him again while you were working. A. I saw him about two hours later.

Q. Where did you see him? A. He came back in the place. He came into the cafe.

Q. Did you have any conversation with him at that time? A. Well, he asked me for a drink and I said, 'No good. I'll give you a beer, Teddy, that's all.' So he had a white coat on and he said, 'How do you like this coat?'.

I said, 'You look pretty good. Maybe you are going out with your girl friend.'

He said, 'Give me a drink.'

I said, 'I'll give you a beer.'

And he took the beer and he took off, no discussions whatsoever. He just drank the beer and went out.

Q. Now, about this white coat, you told us some conversation you had with him. Was there any further words you had with him as to that white coat? A. By that time I couldn't be sure what he said, whether he either got it off a day man or a dead man. I didn't know what he said. I couldn't be sure what he said.

Q. Either a day man or a dead man? A. That's right, I couldn't distinguish.

Q. So you couldn't know which expression he used. A. No, sir.

Q. And this was a couple of hours or so after you last saw him? A. That's right.

Q. Did you see him again after that? A. No, I never saw him again—yes, I did, when they brought me over to identify him.

Q. And that was when, if you know? A. I think that was the next night when I went to work there was a detective over there.

Q. Now this telephone that you were talking about, I assume it is a booth, is that it? A. That's right.

Q. How does it operate? A. It's coin-operated.

Q. A coin-operated booth? A. That's right, closed booth.

Q. Is it a kind of a booth where you pick up the telephone, you give the number, or do you have to dial it? A. You have to dial it."

Warren Van Gelder (3097) and John L. Kelly (3108) were customers of the Oasis Bar & Grill and they corroborate so much of Mr. McGuire's testimony as relates to the first visit by Stovall to the Oasis Bar around 10:30.

James B. Edmondston (3134) was the taxicab driver who picked up the defendant at the Oasis Bar pursuant to the call from McGuire and he came to the conclusion very quickly that he might not get paid for the fare so he left the defendant out of his cab a block away.

Kathryn Maus (3165, *et seq.*) is a young girl who lives in the neighborhood of the crime and on the night in question, she was driving home with her friend, Peter Eischman, when she observed a colored man standing in the middle of Clinton Road, Garden City, waving his hands. According to Miss Maus, he was wearing a white coat.

Walter Girodeau (3193, *et seq.*) was a Negro male nurse, 62 years of age, who worked at the Meadowbrook Hospital in the psychiatric ward. On the night in question, which would be August 23, 1961, Mr. Girodeau was in the vicinity of the railroad station in the Village of Hempstead to meet a friend of his who was in the Army in Jersey and who was on a 48 hour leave. Apparently, the Army buddy did not arrive and Mr. Girodeau met the defendant who he learned was named "Teddy" and in substance Teddy told him that he had only recently come

North and he didn't have any friends, that he lived in Jamaica and had a sister living in Hempstead nearby. Accordingly, Mr. Girodeau invited him to his home to have dinner and a few drinks.

After eating and drinking some Bourbon, Girodeau drove Stovall to his sister's home on Wellington Street and returned to his own premises to go to bed. Later that evening, around 10 or 10:30, he received a telephone call from the defendant, and Stovall asked him if he would drive him to Jamaica. Mr. Girodeau said that he had loaned his car to a friend and that he wouldn't be around to accommodate the defendant.

Finally, the following morning, which would be August 24th, he received a telephone call from someone, whom we already know was Detective Rofheart, and he testified that he told Detective Rofheart that at 10:30 the night before, he had been called by Stovall about driving to Jamaica.

Cross-Examination

The cross-examination of Walter Girodeau, as well as the redirect and the recross (3223-3450) was very extensive, the gist of which is that Girodeau was a sex pervert who committted an indecent act with the defendant and may have been the murderer. There apparently was no evidentiary basis to suggest that Girodeau was in any way connected with the murder except for the fact that he was a hospital orderly and did, in fact, own some white coats such as those worn by orderlies and doctors. From this fact, the inference apparently was to be drawn that he, in some way, was the murderer.

Compared to this offer was the fact that Dr. Behrendt's white coat was found in the defendant's room.

Shirley Stovall Brown (3454, *et seq.*) was the defendant's sister and she testified generally, that on the evening

of August 23, 1961, she was entertaining her current husband, Mr. Brown, when her brother, the defendant, arrived to pay a little visit. She first saw him about 6 o'clock that evening when he stopped for five minutes and again at 8 o'clock when he stayed a little longer.

According to the witness, her brother left at about 11 o'clock to go back to his home in Jamaica and she went to bed. At about 12:30 the defendant returned for a third time dressed in a pair of bloody, black pants and a doctor's white jacket.

Mrs. Brown's testimony is not at material variance with that of her husband, Rosier Brown, who together testified that the defendant, when he left, was wearing dark trousers, a T-shirt, a white dress shirt and a pork pie hat, and when he returned he had a T-shirt, no dress shirt, but instead was wearing a white doctor's jacket.

Mrs. Brown described the bloody condition of her brother's clothes and she also questioned him about his appearance and she testified in substance, he said he heard a woman's cry for help, which he identified as his sister, and he ran in this house and found someone lying in a pool of blood and heard a woman cry and that the woman tried to hurt him and all the time he kept saying that he didn't want to hurt anybody and he went on his knees in the blood on the floor to pray. In effect, he concluded by saying that all of this was just like a dream (3471-3483).

The following morning when they got up, the witness questioned her brother once again about his condition and appearance, and he admitted being in the Oasis Bar, but he couldn't specifically recall the whereabouts of the bloody scene described in his dream. The witness concluded her testimony describing her brother as being in a drunken, dopey condition.

The final witness called on the direct case of the prosecution was Michael Wowk, a stenographer who

recorded a Question and Answer statement of the defendant taken at Police Headquarters on the 24th of August at about 9:46 P. M. by Assistant District Attorney William Cahn. The statement was introduced into evidence apparently without objection (3630-3646).

The defendant's Statement, which is reproduced as People's Exhibit 67 (4734-4776), was a completely negative statement. The defendant admitted meeting Girodeau and having a bite to eat with him, but he maintained that he went directly to his sister's home on Wellington Road, Hempstead, where he remained for the entire evening.

The statement represented a general denial, with no admissions against interest of importance. There was no explanation for the bloody condition of his clothes or the contradictory testimony of his sister and brother-in-law in connection with his successive visits to her home on the night in question.

The Defense

The first witness called in behalf of the accused was Melvin P. Gaddy, who lived at 85 Wellington Street, Hempstead, apparently in the same building with the defendant's sister, Shirley. Gaddy first saw the defendant about 4:30 or 5 o'clock on the afternoon of August 23rd, sitting in a car near the witness' home. At about 6:30 or 7 o'clock, the witness noticed that the car had disappeared. Ultimately, the witness went to bed, but was awakened in the middle of the night to answer a knock at the door and when he did, he found the defendant who was wearing a white doctor's jacket and the defendant had blood on him.

According to Gaddy, he said that Teddy seemed to look strange and his speech was mumbly and he did not seem to know where he was going or what he was doing. In the opinion of Mr. Gaddy, the defendant's actions were those of an irrational person (3738).

On cross-examination Gaddy took the position that he couldn't say that the defendant was drunk or crazy (3750), but just that the defendant did not appear to be himself.

The second witness called by the defense was Deputy Chief Inspector John Lada (3762) who testified generally to the police routine at Headquarters after the defendant had been arrested and which he was being questioned. For the most part the testimony has no relevancy to this appeal particularly because there was no confession.

Chief Lada did testify that in his opinion the defendant did not appear to be dopey or give any indication of any incoherency and that he was absolutely rational (3776).

This concluded the defense to this case.

Rebuttal

The prosecution called Dr. Ernani D'Angelo (3810, *et seq.*), a psychiatrist, in rebuttal and he testified in answer to a hypothetical question (3816, *et seq.*). The Doctor concluded that Stovall knew the nature and quality of his act and knew that it was wrong.

Dr. D'Angelo examined the defendant at Police Headquarters on August 24, 1961 sometimes after the defendant had been arrested and before he was arraigned.

After the direct examination of Dr. D'Angelo was concluded, the defense moved curiously to strike the Doctor's testimony on the ground that the prosecution had injected on rebuttal wholly irrelevant evidence. Apparently, the defense contended the prosecution had no right to offer affirmative proof as to the defendant's state of mind shortly prior, during and subsequent to the moment of the murder. The Judge overruled the objection (3866-3914).

The cross-examination of Dr. D'Angelo dealt primarily with the fact of a man being in the middle of the road, in

the middle of the night, waving his arms and not walking in a straight line. Of course, this fact has reference to the testimony of young Kathryn Maus (3165, *et seq.*) who had testified that a short distance from the murder scene on the night in question, she saw a colored man with a white coat on, in the middle of the road waving his arms.

An effort was made to change the Doctor's testimony as to whether a defendant, who had committed the crimes charged in the indictment, knew what he was doing if, in fact, he was waving his arms in the middle of the night, in the middle of the road near the murder scene. The Doctor maintained that this fact, in and of itself, did not change his opinion as it was equally consistent with the shock and hysteria which overcomes a person when the full impact or realization of the criminal act drives itself home.

REASON FOR THE DENIAL OF THE WRIT

POINT I

Fifth, Sixth and Fourteenth Amendments not violated by show up of defendant at hospital.

It is claimed that when Stovall was taken to the hospital room of Mrs. Behrendt for identification purposes, the circumstances were such as to interfere with his constitutional right to counsel; compel him unconstitutionally to be a witness against himself and generally to deprive him of due process. The District Attorney disputes this.

Chronological Sequence of Events

1. The murder occurred on the night of August 23, 1961.

2. Stovall was arrested at 4 o'clock the afternoon of August 24, 1961.

3. Stovall first appeared for arraignment the following morning, August 25, 1961, where he was advised of his

right to counsel and the formal arraignment was adjourned to August 31, 1961 to permit Stovall to retain counsel.

4. Later the same day, August 25, 1961, Stovall was identified in the hospital by Mrs. Behrendt.

5. On August 31, 1961, the Committing Magistrate assigned veteran criminal lawyer George Mulry, to represent Stovall. Counsel demanded an examination which was set down for September 1, 1961.

6. On August 31, 1961, the Grand Jury of Nassau County indicted Stovall for Murder.

As Regards the Show Up

In his opening the District Attorney *without objection* told the jury that Mrs. Behrendt had identified Stovall while still in the hospital (237-238). Also, in his opening the District Attorney cautioned the jury that Mrs. Behrendt hadn't seen the accused since, so he didn't know whether she would be able to identify him at the trial (*supra*).

The second mention of the fact came on the *cross-examination* of Detective Stalter by defense counsel. It is Detective Stalter's testimony, as we read it, that he was handcuffed to Stovall when they entered Mrs. Behrendt's room at the hospital; that Chief Pinnell, Chief Farrell, Assistant District Attorney Cahn and Detective Rofheart were present, but he does not seem to have testified specifically that Mrs. Behrendt did or did not identify Stovall (1153-1155).

The third mention of the point occurred when Detective Rofheart was *cross-examined* by counsel for the defense, at which time Detective Rofheart testified unequivocally that Mrs. Behrendt identified Stovall as the man who " 'struck my husband down and cut me' " (1803).

Naturally, when Mrs. Behrendt was summoned, she testified on direct examination (2075-2076) *without objection* to the hospital room identification.[1]

Also, on *cross-examination* Mrs. Behrendt was interrogated extensively (2259-2280) on the prior identification and the circumstances surrounding it. As a matter of fact, counsel for the accused made a successful point because Stovall was the only colored man in the hospital room.

The claim is the trial in this regard fell below the minimum standards of the Fifth, Sixth and Fourteenth Amendments for Stovall was compelled to be a witness against himself by virtue of the "show-up" at the hospital after the criminal proceeding against him had been commenced by the first arraignment on the morning of August 25, 1961. Not so (cf. *Holt* v. *United States* [1910] 218 U. S. 245, p. 252; *People* v. *Gardner* [1894] 144 N. Y. 119, pp. 127-129; *Panzich* v. *United States* [1933 9th Cir.] 65 F. 2d 550; *Swingle* v. *United States* [1954 10th Cir.] 151 F. 2d 512; *Meriwether* v. *State* [1940] 63 Ga. App. 667, 11 S. E. 2d 816; *People* v. *Berne* [1943] 384 Ill. 334, 51 N. E. 2d 578; 8 Wigmore On Evidence, 3rd Ed. § 2264; 1 Wigmore On Evidence, 3rd Ed. § 786a; 1 Underhill's Criminal Evidence § 126; McCormick On Evidence § 126; Anno.—Self-Incrimination—Performing Acts, 171 ALR 1144.

In *Holt* v. *United States, supra,* Judge Holmes declared (p. 252):

> "Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible

[1] Mrs. Behrendt was not questioned on direct examination about the voice identification of Stovall. There was no reliance on a similarity so Stovall on the direct evidence at the trial was not convicted because he spoke at the show up at the hospital.

> and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

Speaking of the privilege of an accused not to incriminate himself, Judge Cardoza in *People* v. *DeFore* [1926], 242 N. Y. 13, declared, the courts (p. 25):

> "limit it to cases where incriminatory disclosure had been extorted by the constraint of legal process directed against a witness."

Even more in point was the action of our own State Court of Appeals as long ago as 1894 wherein the court concluded in *People* v. *Gardner* [1894], 144 N. Y. 119 that a trial judge possessed the inherent power at a trial to compel the defendant to stand so a trial witness could better see him to make an identification. It is interesting because defense counsel argued against it claiming it compelled the accused to be a witness against himself in violation of the Fifth Amendment and Article I, Section 6 of the New York State Constitution. The Court unanimously rejected the argument concluding (p. 128):

> "The history of the constitutional provision referred to clearly demonstrates that it was not intended to reach a case like this. * * * *The main purpose of the provision was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in a crime.* * * * A murderer may be forcibly taken before his dying victim for identification, and the dying declarations of his victim may then be proved upon his trial for his identification." (italics mine)

The authority of the trial judge to compel the defendant's appearance at trial where the principal issue was identification was re-affirmed as late as 1955 in *People* v.

Winship, 309 N. Y. 311 on the authority of the *Gardner* case.

Logically then, it must follow that if the trial judge has the power to compel the accused to be present at the trial (*People* v. *Winship, supra*), and at the trial to stand (*People* v. *Gardner, supra*), for identification purposes, it necessarily must follow that a "line-up" or "show up" before trial would not interfere with the defendant's privilege not to incriminate himself.

Defendant concedes "The 'line up' or 'identification parade' is a legitimate tool of police investigation and law enforcement" (defendant's brief, p. 53), but he argues that it is constitutionally bad if it occurs after the commencement of the criminal proceeding against the accused. This simply could not be (*People* v. *Gardner, supra*).

Surely, if defendant's constitutional privilege is not compromised by compelling defendant's presence at the trial (*People* v. *Winship, supra*), it would not be infringed by requiring his presence at an *earlier* stage of the prosecution. (*Meriwether* v. *State* [1940] 63 Ga. App. 667—11 S. E. 2d 816; *People* v. *Berne* [1943] 384 Ill. 334, 51 N. E. 2d 578).

Method of Identification Goes to Weight Not Competency

It is clear that the principal thrust to the appellant's brief relates to the weight and not the competency or constitutionality of the evidence regarding a prior identification. In this connection, it is the settled law everywhere that the method of identification goes to its weight and not competency (*People* v. *Parham* [1963] 33 Cal. Rptr. 497; 384 2d 1001; *People* v. *Hicks* [1961] 22 Ill. 2d 364, 176 N. E. 2d 810; Anno.—Extrajudicial Identification 71 ALR 2d 449.)

Thus, where a defendant was placed in a line-up with five others and all tried on his hat and coat, which fitted

only him, only the weight of evidence was affected (*People* v. *Parham, supra*). Likewise, where the police told the victim at a line-up they believed they had the burglar and named him, obliging the defendant in the line-up to state his name goes only to the weight to be attached to such identifying evidence (*People* v. *Hicks, supra*).

Everywhere it is said the reliability of the line-up identification is a question for the jury (*Sippio* v. *State* [1962] 227 Md. 449, 177 A. 2d 261; *supra*, 71 ALR 2d 449).

The general rule has been succinctly stated by the Illinois Supreme Court as follows (*People* v. *Crenshaw* [1959] 15 Ill. 2d 458, 155 N. E. 2d 597, p. 604, cert. den. 359 U. S. 997):

> "There is no requirement in the law that an accused person must be placed among a group of persons for the purpose of testing the ability of a witness to identify him as the guilty person, * * * and where an accused is not selected from a group, such fact does not render evidence of identification incompetent but only affects its weight. * * * Similarly, where claim is made that identification was induced by police suggestion that the guilty party is in custody, * * * such procedure does not completely destroy the evidence of identification, but affects only its weight and credibility."

Overall, there can be no doubt regarding the weight of evidence identifying Stovall as the murderer of Dr. Behrendt.

First of all, we have the testimony of the wife of the deceased, Mrs. Behrendt, who unequivocally pointed out the accused as her husband's killer and the man who assaulted her. Her testimony relative to the show up in the hospital room, while in itself of no great probative value, was certainly a competent factor for the jury to consider.

Secondly, there is the conceded fact that the defendant's bloody and torn shirt was found in the kitchen beneath the

overturned refrigerator, which, in itself, was an extremely damaging circumstance.

Third, we have the evidence of the defendant's key to his locker at the Abraham & Straus Department Store that was also found at the scene and which was of very great importance in putting Stovall at the scene.

Fourthly, the People relied upon the bloody clothing, including the trousers and shoes of Stovall which were secured at the time of his arrest and which pointed irresistibly to him as the burglar and party committing the homicide.

Fifth, the People proved that the defendant was at the Oasis Bar, a neighborhood tavern, at and about the time of the homicide, all of which Stovall falsely denied.

Sixth, the People relied upon the white doctor's coat belonging to the deceased which was recovered from the bedroom at sister Shirley's house where Stovall was arrested to connect Stovall with the crimes.

It is respectfully submitted that the evidence identifying Stovall was overwhelming and nothing that happened in connection with the identification of the accused at the time deprived him of a Fifth, Sixth or Fourteenth Amendment right.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 254

THEODORE STOVALL,

Petitioner,

vs.

HONORABLE WILFRED DENNO, Warden.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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THEODORE STOVALL,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals sitting in banc is reported at 355 F. 2d 731 and is set forth at R. 37-59. The panel opinion, vacated by the in banc decision, is not reported and appears at R. 24-35. The district court opinion (R. 14-18) is not reported.

Jurisdiction

The judgment of the Court of Appeals (panel) was entered on March 31, 1965, and vacated January 31, 1966 (R. 60) when the judgment of the in banc court was en-

tered (R. 61). The petition for a writ of certiorari was filed on April 19, 1966, and granted on June 20, 1966 (R. 62).

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

Question Presented

Whether the Petitioner, arraigned, tried and convicted of a capital offense, was denied his rights under the Fifth, Sixth and Fourteenth Amendments when after arraignment and request for counsel he was taken by police officers to the hospital room of one of the victims and there, without counsel, was compelled to speak, to expose his person, and to otherwise comport himself in a manner calculated to facilitate his identification; evidence of such identification then being used at Petitioner's subsequent trial to secure conviction.

Summary Statement of Facts

Procedural Background

Theodore Stovall was convicted of Murder in the First Degree in the County Court, Nassau County and on September 6, 1962 was sentenced to death.[1] Upon direct appeal to the New York Court of Appeals the judgment was affirmed without opinion (13 N.Y. 2d 1094) and the remittitur amended upon a *pro se* application (13 N.Y. 2d 1178). No application was made to this Court for a writ of certiorari.

---

[1] A stay of execution was granted by the Second Circuit on October 15, 1964 and remains in force "pending further order of [that] Court." (Proceedings, CA-2, p. 41a)

Petitioner then applied, *pro se*, to the district court below for a writ of habeas corpus alleging (1) illegal search and seizure; (2) that his being forced to accompany police to a hospital for the purpose of being identified violated his rights under the Fifth and Fourteenth Amendments at a time when the Petitioner had already been arraigned on the capital charge but was not then represented by counsel (R. 5); and (3) that assigned counsel in the New York courts had failed to file a petition for writ of certiorari after representing to the Petitioner that he would do so (R. 5-7).[2]

After assigning counsel and hearing argument the district court dismissed the writ. Upon appeal to the Second Circuit the dismissal was reversed and the case remanded with directions to sustain the writ unless Petitioner was retried within a reasonable time. Upon rehearing in banc the panel decision was vacated and the district court judgment affirmed.

The Relevant Facts[3]

At approximately 12:30 a.m. on August 24, 1961, Doctor Paul Behrendt was stabbed to death and his wife wounded in their home in Garden City, Long Island. By approximately 4:00 p.m. that day the Petitioner had been taken

---

[2] This claim has never been pressed by counsel in these proceedings on the assumption that the habeas forum is at least as broad as certiorari review and the Petitioner was therefore not prejudiced by the failure of counsel to proceed further after representing that he would do so. *Fay* v. *Noia*, 372 U.S. 391, 435-38 (1963).

[3] Our presentation here is limited to those facts directly bearing upon the issues raised by this case. A detailed analysis of the state record is set forth as an appendix (*infra*, pp. 21-54).

into custody. Through the remainder of the day and night Stovall was questioned and taken from place to place in connection with the investigation. Although certain admissions were elicited during the interrogation the Petitioner steadfastly maintained his innocence and ignorance of the crime.[4]

In the morning of the following day the Petitioner was brought before a Judge of the First District Court, Nassau County, where he was arraigned upon a charge of Murder in the First Degree under Penal Law, § 1044(1), a crime which carries a mandatory death penalty upon conviction.

After reading the complaint, the Court told the Petitioner:

> The Court: * * * The charge against you is violating Section 1044 subdivision 1 of the Penal Law of the State of New York, which is murder in the first degree. You have the right to the aid of a lawyer or counsel in every stage of the proceeding and before any further proceedings are had. Do you want to get a lawyer? If you do I'll give you time to get one before we proceed at this particular time.
>
> The Defendant: Yes, sir.
>
> The Court: Now, I wish to advise that—you're getting your own lawyer, is that right?
>
> The Defendant: Yes, sir.

---

[4] The *pro se* habeas petition raises no claim relating to the use of the admissions. The majority opinion of the *in banc* court erroneously states that Stovall made "no statements or confessions whatsoever" (R. 39). In the statement admitted into evidence Stovall acknowledged that the keys and torn shirt found within a few feet of Dr. Behrendt's body were his but he denied knowledge as to how they got there (Folios 4759-60).

The Court: All right, I'll put it over to August 31st, next Thursday, for the purpose of getting an attorney. The defendant is remanded pending further pleading. That's all. (R. 20)

The "remand" of Petitioner was pursuant to Section 192 and 193 of the New York Code of Criminal Procedure which require that a remanded defendant be committed to the custody of the sheriff. However instead of being turned over to the sheriff, Stovall was taken by detectives from the courtroom,

> ". . . handcuffed to one of them, to the hospital where Mrs. Behrendt had undergone extensive surgery, and into her room. Three high police officers and two prosecutors were also there. One of the police officers asked Mrs. Behrendt whether Stovall was 'the man'; she said he was. At some time one of the officers asked Stovall 'to say a few words for voice identification'; he did—just what does not appear" (opinion Friendly, C.J.; R. 27).

On August 31st, the adjourned date of the arraignment, the Petitioner was brought back to the First District Court and asked by the judge then presiding:

> "The Court: You were advised that you were given time until today, August 31, to return here with a lawyer. Have you obtained counsel?
>
> Mr. Stovall: I have requested for one, sir.
>
> The Court: You have requested. Who did you request?
>
> Mr. Stovall: I requested the jailhouse where I was at for a lawyer.

The Court: Well, did you get in touch with any of your relatives to see if they would get counsel for you, or a lawyer for you?

Mr. Stovall: No, I didn't.

The Court: Well then, what were you advised over in the jail?

Mr. Stovall: They said I would get one. They told me to write a letter to the warden and he said I would be assigned a lawyer. (R. 21-22).

The Judge then assigned Stovall an attorney from among those present in the courtroom and after a brief conference a hearing upon the complaint was demanded and set down for the following day (R. 22).

Almost a year later Stovall was brought to trial upon a charge of murder in the first degree. In his opening the district attorney told the jury,

"There will be further evidence that Mrs. Behrendt observed this defendant while she was in the hospital and the defendant was taken to her. She identified him. I don't believe that she has ever seen him since, and whether she will be able to identify him here in court. I do not know at this time. But she will be called. * * * " (Folios 237-38)[5]

Prior to Mrs. Behrendt's testimony defense counsel cross examined those officers present in the hospital room as to the alleged suggestive nature of the hospital identification, bringing out that Stovall, in handcuffs, was the

[5] All references by Folio are to the printed volumes of the Record on Appeal to the New York Court of Appeals which is part of the district court record on file with the Clerk of this Court.

lone Negro in the room with seven white officers when the identification took place and that he had been told to "say these words" for voice identification (Folios 1803-05).

Mrs. Behrendt identified the defendant at trial as her assailant and the killer of her husband. Without objection she testified that she had previously seen the defendant when he had been brought into her hospital room two days after the killing and assault (Folios 2075, 76). On cross examination she said that prior to the hospital room identification she was told "they would bring a suspect" in (2268).

The sole defense offered by Stovall, who did not testify, was that the crime had been committed by one of the prosecution's witnesses. (See *infra*, Appendix pp. 46, 48-49). Upon summation defense counsel referred to the hospital identification procedure as a "crucifixion" and that the manner in which it was conducted would have resulted in Mrs. Behrendt's identifying anyone brought before her (See Folios 4025-26).

ARGUMENT

Introduction

The Petitioner was arraigned in the morning of August 25, 1961 upon a complaint charging murder in the first degree. The arraignment minutes show that the Petitioner was not advised of his right to assigned counsel, as is required by New York law,[6] and the subsequent adjourned arraignment minutes show the Petitioner's inability to re-

[6] *People* v. *Witenski*, 15 N.Y. 2d 392 (1965).

tain counsel and utter lack of comprehension of the manner in which to assert his right to assigned counsel (R. 21-22).

Notwithstanding the fact that Petitioner was on August 25th, "remanded . . . pending further pleading" he was returned to the custody of his accusers in violation of state law which requires a commitment to the sheriff.[7]

He was then taken by the two officers to the hospital room of the wife of the deceased and there made to speak "these words" for voice identification and to present himself to the victim-witness for corporal identification. This exposure of the Petitioner resulted in a positive identification by Mrs. Behrendt less than forty-eight hours after the homicide. Testimony of this identification was used at trial pursuant to Section 393(b) of the Code of Criminal Procedure which allows such testimony both as independent proof of identity and as corroboration of an in-court identification. *People* v. *Spinello,* 303 N.Y. 193 (1951).[8]

The identification testimony of Mrs. Behrendt was the only direct evidence of Petitioner's guilt. The prior identification in Mrs. Behrendt's hospital room was not the result of a "line-up" or "identification parade" but rather was the product of a "show-up", i.e., where only one person is produced to be identified.

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[7] Code of Criminal Procedure, §193. Upon argument before the panel, the District Attorney of Nassau County stated that the sheriff of Nassau County does not have a representative available in the arraigning courts and that responsibility for placing committed defendants in his hands rests with the police (Panel opinion, Friendly, C.J., at R. 26-27).

[8] Prior to the enactment in 1927 of Section 393(b), New York followed the common law rule which excluded all evidence of prior identification. *People* v. *Jung Hing,* 212 N.Y. 393 (1914).

This identification device has been condemned by every legal scholar considering it. Dean Wigmore, perhaps the strongest critic of such techniques, wrote:

> "... there is no excuse for jeopardizing the fate of innocent men by such clumsy, antiquated methods; a recognition under such circumstances is next to worthless."
>
> 4 Wigmore, *Evidence*, §1130, n.2

Professor Borchard in his *Convicting the Innocent*, at p. 84 (1932) states the grounds for discounting such evidence:

> "The emotions of the victim ... create a predisposition to believe the worst of a person brought before him as a probable offender, especially where there is no alternative suspect."

As bad as the "show-up" may be, this case presents an identification made under more aggravating circumstances.

In 3 Wigmore, *Evidence*, §786a (3rd Ed. 1940) at p. 164, n. 2 an instance is reported where:

> "... to identify a burglar, the police brought the arrested man *handcuffed into the presence of the women* whose jewelry had been stolen!" (emphasis in original)

According to Wigmore, "the suggestion of identity could not have been more violent." Wigmore, *Corroboration by Witnesses Identification of an Accused on Arrest*, 25 Ill. L. Rev. 550 at 551 (1931).

Contrary to Dean Wigmore, the suggestion of identity *could*, and here was, more violent; for the accused, of a dif-

ferent race than the victim, was compelled to speak and stand surrounded by seven officers not of his race.

Justice Frankfurter, who could have been commenting on this case, wrote

> "In the Sacco-Vanzetti case the elements of uncertainty were intensified. All the identifying witnesses were speaking from casual observation of men they had never seen before, men of foreign race, under circumstances of unusual confusion . . . Moreover, the methods pursued by the police in eliciting identification fatally impaired its worth. In England, such methods would have discredited the testimony and nullified a verdict based upon it. The recognized procedure is to line up the suspect with others, and so far as possible with individuals of the same race and class, so as not to provoke identification through accentuation. In defiance of these necessary safeguards, Sacco and Vanzetti after their arrest were shown singly to persons brought there for purposes of identification, not as part of a 'parade' [i.e., line-up]. Moreover, Sacco and Vanzetti were not even allowed to be their natural selves; they were compelled to simulate the behavior of the Braintree bandits. Under such conditions identification of foreigners is a farce."[9]

In England the use of the show-up generally resulted in the quashing of convictions based upon evidence obtained through these means. See, *Dickman* [1910], 5 Crim. App.R. 135, 142-43; *Chapman* [1911], 7 Crim. App.R. 53, 55-56; *Williams* [1912], 8 Crim. App.R. 84, 88.

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[9] Frankfurter, The Case of Sacco and Vanzetti (Universal Library Edition, 1962) at 31-32. See also, Borchard, *supra*, at 64.

Current English practice prevents any such show-up or bogus line-up as was conducted here. In England the suspect is entitled to be presented for viewing with persons of his own age, general appearance, and the like and he is entitled to have his solicitor or friend present. Wall, *Eye Witness Identification in Criminal Cases*, 40-65 (1965); *Extract from Home Office Consolidated Circular to Police* (1925) (quoted at 3 Wigmore, *Evidence*, pp. 164-165 [3rd Edition]); Glanville Williams, *Identification Parades*, [1955] Crim. L. Rev. (Eng.) 525, 527-28.

Prior to the publication of Mr. Wall's book the problem of pre-trial identification procedures had been treated by American courts as one going to the weight of the prior identification. Following its publication we have, beginning with *Stovall*, the consideration of the constitutional barriers to the admissibility of such evidence.[10] As raised here Petitioner claims three separate, albeit overlapping, violations of constitutional right by the identification procedure followed in this case.

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[10] See, e.g., *Wade* v. *United States*, 358 F. 2d 557 (5th Cir.) *cert. granted*, No. 334, O.T. 1966; *People* v. *Gilbert*, 47 Cal. Rptr. 909, 408 P. 2d 365, *cert. granted*, No. 223, O.T. 1966; *Palmer* v. *Peyton*, 359 F. 2d 199 (4th Cir., 1966); *Golliher* v. *United States*, 362 F. 2d 594 (8th Cir., 1966); *Gilbert* v. *United States*, —— F. 2d —— 35 U.S. Law Week 2170 (9th Cir., Sept. 16, 1966); *Rigney* v. *Hendrick*, 355 F. 2d 712 (3rd Cir.); *United States* v. *Chubbuck*, 361 F. 2d 365 (3rd Cir., 1966).

I.

The Prior Identification Was Obtained After Arraignment on a Capital Charge and in Violation of Petitioner's Rights Under the Sixth Amendment.

When the Petitioner was arraigned on August 25th, he became a defendant in a capital case. His absolute constitutional right to counsel had come into being and the subsequent actions resulted in the denial of the right.[11] Directly flowing from this denial of right was the release of the accused to his accusers and the transporting of the Petitioner to the hospital room where, absent any of the safeguards discussed above, the prosecutor was allowed to create evidence used to secure conviction at the subsequent trial.

The decisions of this Court hold that evidence so secured is absolutely barred from a capital trial, regardless of the absence of trial objection or a defendant's inability to show the extent to which the tainted evidence prejudiced his defense.[12]

The three-judge majority of the *in banc* court, contrary to this Court's holding in *Hamilton* and *White*, asks (at

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[11] In the court of appeals we urged on the authority of a prior Second Circuit decision (*United States ex rel. Weinstein* v. *Fay*, 333 F. 2d 815) that the advice given (R. 19-20) was inadequate and perfunctory and therefore prevented Petitioner from asserting his right to assigned counsel (see, *People* v. *Witenski*, 15 N.Y. 2d 392, which requires detailed enquiry and advice). However, the court below found that Petitioner had asserted his right. While we still maintain that the advice given was inadequate the legal principles involved here are equally applicable to either interpretation of the record.

[12] *Hamilton* v. *Alabama*, 368 U.S. 42 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963).

R. 48), "what could counsel have done to thwart the identification?" This argument misses the heart of the issue. It is not an attorney's duty to thwart anything, be it an identification, a confession, or conviction. It is an attorney's duty to try and protect his client's rights and insure against over reaching by the prosecution. Had the judge on August 25th made a more searching enquiry concerning Stovall's needs and desires concerning counsel, there would then and there have been an attorney assigned. That attorney, it is true, could possibly have thwarted the release of Petitioner to the detectives,[13] however, and more significantly, counsel could in Stovall's own interest have requested either the court or district attorney to direct that the presentation of Petitioner to Mrs. Behrendt be accomplished under conditions which did not pinpoint him as the person to be identified. Wall, *Eye-Witness Identification in Criminal Cases,* at 43. Failing in all this, counsel could have told Stovall that he did not have to "say these words . . . for voice identification" unless other voices were likewise presented. *Palmer* v. *Peyton,* 359 F. 2d 199 (4th Cir., 1966).

The panel dissent and the *in banc* majority state that the hospital identification was necessary to *protect* Petitioner (R. 34, 40) for it lay in Mrs. Behrendt's lips to exonerate Stovall if he was not the man. While we con-

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[13] In *United States ex rel. Weinstein* v. *Fay, supra,* Chief Judge Lumbard stated in setting aside a New York conviction based upon a confession to burglary obtained after a no-counsel arraignment on a sham vagrancy charge,

> "Furthermore, it is unlikely that the ex parte conference which took place between the magistrate and the police officer would have taken place had the relator been represented by counsel. And it is even more unlikely that he would have been paroled into police custody." (333 F. 2d at 818)

cede the legitimate prosecutional goal of exoneration of the innocent we dispute the premise that a possibly worthy motive can displace the right to counsel. Compare, *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964).

II.

The Prior Identification Was Obtained Under Conditions Which Were Fundamentally Unfair and Which Violated Petitioner's Rights Under the Fourteenth Amendment.

The "line-up" or "identification parade" is a legitimate tool of police investigation and law enforcement. Where its results are admitted at trial as proof of guilt it should comport with some minimal standard of "fundamental fairness." The prior identification in this case does not meet such a standard, for the out-of-court identification of this accused is infected with every vice about which so much has been written in the last fifty years.[14] As recently stated by a Canadian court:

> "If the means employed to obtain evidence of identification involved any acts which might reasonably prejudice the accused, the value of the evidence may be wholly or partially destroyed. Anything which lends to

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[14] We note that by police regulation the procedure used here is condemned—but only when a police officer is the accused. *The Rules and Procedures of the Police Department of the City of New York*, Chapter 21, §6.1 (1956) provides:

> "In attempting to identify the accused, a line-up of at least six members of the force shall be used if possible. They shall be in uniform or civilian clothes, according to the nature of the complaint. When in uniform, they shall not wear shields or cap devices."

convey to a witness that a person is suspected by the authorities or is charged with an offense, is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust." [15]

When compared with the grounds for excluding involuntary confessions, we find that the method of obtaining this evidence of identification contains all those "totality of circumstances" which in the past have voided statements as involuntary.

Here we are dealing with no exclusionary rule designed to prevent consideration of reliable evidence of guilt. We are asking for the exclusion of unreliable evidence obtained in an unfair manner where the unreliability of the evidence increases in direct proportion to the unfairness by which it was obtained.

Notwithstanding the unreliability, as in traditional coerced confession cases, the tainted evidence is devastatingly relevant to the central issue in most criminal trials. To even permit the jury to consider such evidence casts upon the defendant the burden of dislodging from a juror's mind evidence which but for the initial unfairness, might never have existed.

Convictions in criminal cases rarely occur in the courtroom. Usually guilt or innocence is sealed by the pre-trial investigations by counsel for both the state and the defendant and a verdict after trial or guilty plea is merely the culmination of what has gone on before. To be meaningful the concept of fundamental fairness embodied in the Fourteenth Amendment must be applicable to those preliminary

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[15] *Rex* v. *Smierciak* [1947], 2 D.L.R. 156, at 157-58 (Ont.).

stages where in substance the defendant's guilt or innocence is established.

The Petitioner was identified under a procedure which cried out for his selection as the assailant and the unfairness of this identification procedure infected the trial at which the evidence so secured was used.

III.

The Prior Identification Was Obtained Under Conditions Which Violated Petitioner's Rights Under the Fifth Amendment.

Though we do not overlook the force of this Court's opinion in *Schmerber* v. *California,* 384 U.S. 757 (1966), we believe the incident involved here is sufficiently distinguishable to allow for consideration of Petitioner's claim under the self-incrimination provision of the Fifth Amendment.

In *Schmerber,* as here, the Court had before it testimonial evidence obtained by use of the body of the accused. However, there the similarity ends.

The evidence obtained in *Schmerber* was not only of the highest reliability but it was obtained in a "medically acceptable manner." The evidence obtained here fails to meet either of these qualifications. While it might appear that these limitations upon *Schmerber* are applicable only to the Sixth and Fourteenth Amendment aspects of this case, we suggest that they go further and leave room for a self-incrimination claim such as is made here.

The privilege against self-incrimination is violated when an accused, against his will, is made to supply evidence for use in his prosecution.

Schmerber, as did *Holt* v. *United States,* 218 U.S. 245 (1910) before it, exempted from this prohibition certain "real or physical evidence" obtained through the use of the body of the accused. We suggest that *Schmerber* and *Holt* are, or should be limited, to those situations where the evidence sought and obtained is an unalterable objective truth, or at least as close to it as human frailty permits. For example, if a type of test for intoxication had been administered which recorded not the scientific truth of the accused's blood-alcohol ratio but rather the clarity of his mental or physical responses to given stimuli and proof was offered that the responses were consistent with intoxication but not inconsistent with nervousness or external conditions under which the evidence-gathering test was given, then we suggest that *Schmerber* would not apply.

The production of Petitioner for corporeal and voice identification at the evidence seeking confrontation cannot be separated from the conditions under which the confrontation took place. It was those conditions, in part forming the basis for our independent claim for relief under the Sixth and Fourteenth Amendment, which takes this case out of the testing for the objective fact permitted by *Schmerber.*

The Relief Sought

The panel decision in *Stovall* ordered a retrial without the use of the evidence of prior identification, leaving open to defense counsel the option of referring to it on cross examination of Mrs. Behrendt in order to show or suggest that her presumed in-court identification at the retrial was based upon her recollection of seeing Stovall in the hospital room rather than in her home. Upon the rehearing, Chief Judge Lumbard in his concurring opinion (R. 53) indicates that the hospital identification possibly "psychologically colored" the in-court identification and that if the prior identification was improper then the only consistent way of dealing with the situation would be to bar *both* the prior identification and the in-court identification. This view was adopted by the Fifth Circuit in *Wade* v. *United States, supra.*

Having only asked in the court below for a retrial without the testimony relating to the prior identification we are uncertain as to our standing to ask for the broader relief granted in *Wade.* However, it would seem that consideration should be given to whether there is not a mid-point between the conflicting views. We suggest that if the evidence of this prior identification is constitutionally inadmissible then a *voir dire* could be held at which the extent of the impact of prior identification upon the ability to presently identify could be developed. If the prosecution can establish that the ability to presently identify is free and independent of the prior identification then the evidence should be allowed. See, *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920).

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to the district court with directions to sustain the writ of habeas corpus unless Petitioner is retried within a reasonable time.

Respectfully submitted,

LEON B. POLSKY
The Legal Aid Society
Counsel for Petitioner

Analysis of the State Record

The State Record*

Prior to the commencement of trial defense counsel moved on May 10, 1962 to suppress evidence allegedly seized from the defendant's apartment in Jamaica (89, 96, 98) or in the home of defendant's sister in Hempstead (96, 98, 124-126).

The District Attorney advised the Court and counsel that the People did not intend to offer in evidence on their direct case any items found in the defendant's home in Jamaica (125).

Voir Dire

Deputy Chief Inspector John Lada of the Nassau County Police Department testified that on August 24, 1961 at 4:15 P.M. he arrested the defendant in a bedroom in his sister's home in Hempstead (144-45). Immediately prior to the arrest he had been told by police headquarters "that Lieutenant Kleszak who was in the city [Jamaica] checking Stovall's room had found a shirt bearing the same laundry mark that was on the shirt that was found at the scene and I was also told that a key that was found at the scene belonged to a locker at Abraham and Straus store where Stovall had worked" (147). In the morning of the day of Stovall's arrest the police had received information that Stovall had been seen wearing a white jacket which was believed to belong to the homicide victim (149).

Upon arriving at the home of Shirley Stovall Brown he knocked at the door and asked "where Teddy Stovall was" (145). He was admitted by the sister who took the officer upstairs to a bedroom and pointed to the defendant lying on a cot (146). Captain Hynes, who was with Inspector Lada, asked Mrs. Brown where Stovall's clothing was and

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* References are to folios of the Record on Appeal to the Court of Appeals, New York.

she pointed out some clothes in the closet and gave them to Captain Hynes (150). A white jacket, taken by Captain Hynes, was marked People's Exhibit 1 and was identified by Inspector Lada (153-156).

On cross-examination Lada testified that there were four officers with him when he went to the Hempstead house, but only three went inside (156-157). They also removed a pair of trousers and a hat from Stovall's room (159) and the defendant had his shoes on while asleep on the cot.

Captain William Hynes of the Nassau Police testified that in the afternoon of August 24th he was advised by telephone that the shirt found at the scene of the crime bore the same laundry mark as shirts found in Stovall's Jamaica apartment by another team of officers (171).

Also a key which had been found at the scene of the crime had a number on it which corresponded with the number of the defendant's locker at Abraham and Straus (171-172). Also it had been told the police that the defendant had been seen wearing a white "professional jacket" in a bar near the scene of the homicide and told the bartender that he obtained the jacket from a dead man (173). Hynes identified the jacket (Exh. 1) and also identified the trousers and hat taken at the time of Stovall's arrest, which were marked as Exhibits 2 and 3 (176-177).

The Court "overruled" defendant's objections to Exhibits 1, 2 and 3 (197).

Case in Chief

Lieutenant Edwin Hausser of the Garden City Police testified that in response to a telephone call he and Patrolman Matwiow went to the home of Dr. Paul Behrendt at the corner of Clinton and Pine in Garden City. They arrived at about 12:55 A.M. on August 24, 1961 (263-265). Finding the doors locked, they broke in (265-267). They saw a body, later identified as Dr. Behrendt, lying on the floor of the kitchen (268). They heard sounds from upstairs and upon investigating found Mrs. Behrendt covered with blood and sitting on a bed (269). Hausser described the state of

disarray of the kitchen including that a refrigerator had been toppled over and was lying on its side.

Dr. Joseph E. Foehr testified that he examined Dr. Behrendt at about 1:00 A.M. on August 24th and pronounced him dead (380). He could give no opinion as to the time of death (395). He also examined Mrs. Behrendt who was semi-conscious and in a state of shock (382-83).

Helen Sims testified that she was employed by the telephone answering service to which Dr. Behrendt subscribed. At 12:45 A.M. she received a call on the Doctor's line, but did nothing. She then received a second call on the line and in response to this she called the Doctor's home and after speaking with Mrs. Behrendt, she called the police at approximately 1:00 A.M.

Detective Fred Catapano testified that he arrived at Dr. Behrendt's house at about 2:00 A.M. on August 24th (515). Upon entering the kitchen he saw the deceased lying on the floor and the kitchen in "shambles" with the refrigerator turned over (517).

At about 5:30 A.M. he returned to the kitchen after the refrigerator had been stood upright, and noticed a torn bloodied shirt on the floor in the same location as where the refrigator had previously been lying (518). Inside the shirt pocket was a key chain with three keys on the chain (518-19). The shirt bore a laundry mark "R 2264" (523) and the keys had markings "358" and "EA27" (524). He turned the shirt and keys over to Detectives Stalter and Rofheart (525).

John R. Randall testified that he was an assistant personnel director at Abraham and Straus (560) and that the Company's records showed that Stovall was an employee on August 23, 1961 (561) and that he was assigned locker number 358 (362).

Arievenia Paschal testified that she had known Stovall for three or four months prior to August 1961 and had taken the defendant's shirts to a Chinese laundry on Sutphin Boulevard, about five blocks from the house where they both lived (638-39).

Go Yee testified through a Chinese interpreter that he operated a laundry on Sutphin Boulevard, Jamaica, in August 1961. He was able to identify as his the marks on the shirt found by Detective Catapano but could not identify the person to whom the shirt belonged (665).

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Further colloquy was had between counsel and the Court concerning the defense attempt to obtain a voir dire on the extent to which information obtained during the Jamaica search led to Go Yee and identification of the defendant. During this colloquy the Court announced its position:

> The Court: Well, I passed yesterday on the principle that the Mapp case does not go as far as defense counsel contended, that any effects that might flow from illegally-seized items would bar evidence thereafter. Now I have decided that — (201)

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> Ada Spitzer: May I clarify my position. When we discussed this in chambers I said that I would look into it but I also stated as I have said here before that in my opinion the poison fruit doctrine does not apply as far as any cases are concerned in the State of New York.
>
> Mr. Castellano: And your Honor agreed with him on that point.
>
> The Court: I agreed with him.
>
> Mr. Spitzer: Now when your Honor reserved decision in chambers and then came out and announced your decision, I assumed that you took the position that the poison fruit doctrine had no application in the State of New York.
>
> The Court: I did.
>
> Mr. Spitzer: Thereafter it was immaterial to check this matter any further to see whether or not the leads so called were obtained from this apparent or alleged illegal search

The Court: Yes, that is exactly the position that I have taken. (716-717)

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The Court: The court's position is that the doctrine of the illegal fruit arising out of the illegal search and seizure does not apply to the state courts. I have been unable to find any law that says it does, and under the circumstances I am going to deny your motion and you have it on the record (723-724)

(Trial Resumed)

Dr. E. T. Montgomery testified that he treated Mrs. Behrendt in the emergency room at Nassau Hospital. She was in shock, but conscious, and bleeding from multiple wounds (734). She had seven lacerations or punctures in various parts of her body (735 et seq.). The wounds could have been made with a knife or similar sharp instrument (743, 755-56).

On cross-examination Dr. Montgomery testified that Mrs. Behrendt received a total of eleven wounds or lacerations (2613-14) only two of which he would classify as severe. Mrs. Behrendt was of type A blood (2671).

Patrolman Lewis Gebhardt testified that he found an umbrella (Exh. 24, Ident.) about one block from Dr. Behrendt's house at about 6:55 A.M. on August 24th (761, 764).

Detective Boyden Stalter testified that he arrived at the Behrendt home at about 1:15 A.M. During the course of the early morning he saw Detective Catapano hand the shirt and keys to Detective Rofheart (795-96). He received the umbrella from Gebhardt (789-90) and saw a knife handle with a broken blade lying on the dining room table (799) and the remainder of the blade lying in a pool of blood in the kitchen floor (799). (Exh. 22, Ident.)

Stalter questioned the defendant at police headquarters in Mineola in the late afternoon of August 24th. The defendant admitted that the umbrella and keys were his (815).

Over objection* Stalter testified that two days later he and other officers went to the defendant's home in Jamaica and fitted the keys in the front and rear doors (817); they then went to Abraham and Straus and fitted key number 358 into the lock of Locker #358 (819).

Over constitutional objection (823-24) photographs showing the three keys inserted in the respective locks were received in evidence (823-828).

At the time Stalter questioned the defendant concerning the umbrella, the defendant had been in the police station for about two and one-half hours (924). Stalter saw no bruises on the defendant when he first saw him at 4:15 P.M. in front of Dr. Behrendt's home (927) and went with him to police headquarters in Mineola. Stalter was not sure whether Stovall was questioned for less than fifteen minutes or more than five hours in the evening of August 24th (939-942, 948).

During the course of the interrogation of the defendant his shirt was removed (981). Stalter was present intermittently during the interrogation by Inspector Lada and Lieutenant Tuthill but did not recall any of the questions or answers.

On cross-examination Stalter testified that the defendant was arraigned in the morning of August 25th and was then brought back to police headquarters (1139). In the afternoon of August 25th Stalter and two other officers took the defendant in handcuffs to Mrs. Behrendt's room at Nassau Hospital. Present in Mrs. Behrendt's room at the hospital were Chief of Detectives Pinnell, Chief Farrell, District Attorney Cahn and another Assistant District Attorney (1153). The defendant was the only Negro in the room (1155).

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* Mr. Castellano: I object to this testimony on the ground previously stated for the record and along the same lines as I discussed with your Honor before the jury came in.

The Court: Your objection is overruled. Exception will be noted. (818).

Dolores Ramos a route salesman for Professional Linen Service identified a white jacket (Exh. 30, Ident.) as having been supplied to Dr. Behrendt (1260-1264).

Captain William Hynes of the Nassau County Police Department testified that he was present when the defendant was arrested at about 4:00 P.M. on August 24th and that Stovall's sister, Shirley, led Hynes to the closet where certain garments were found (1269-1272). Hynes identified Exhibit 30, for Identification, as one of the garments seized (1282). Captain Hynes identified a pair of trousers and a hat seized at the time of defendant's arrest, Exhibits 31 and 35, Identification (1362-63) which he turned over to Detective Rieder of the Technical Research Bureau (1368).

At the time of Stovall's arrest he was wearing a white shirt and a pair of gray trousers; he was not then wearing shoes or socks (1375). The room in which the arrest took place was "a very small room" with a closet and was a part of the apartment of Shirley Stovall Brown which took up the upper floor of the two family house (1377). Hynes testified that the trousers (Exh. 31) were lying on the floor near the closet when they entered (1378) and that the hat (Exh. 35) was on top of a chest or a trunk (1379). The white jacket (Exh. 30) was inside the closet, the door of which was closed when they entered the room (1379). Shirley Stovall Brown went to the closet and brought out the white jacket in response to Hynes' asking her what Stovall had worn the night before (1380-81).

Stovall wore the hat to the police station but Hynes took it away from him after they arrived (1385-86).

Captain Hynes saw Stovall being interrogated by Inspector Lada and Lieutenant Tuthill in the former's office but could not hear what was said (1387-1392). He saw no marks or bruises on the prisoner (1393).

Hynes saw the prisoner again at about 9:00 P.M. and offered him a sandwich (1404). He saw the prisoner again at about midnight while he was waiting for a doctor (1403). The doctor who came around midnight was a psychiatrist

(1413). The psychiatrist, Dr. D'Angelo, examined the prisoner in Chief Farrell's room (1416).

Jose Diaz, a driver for Professional Linen Service, identified Exhibit 30 for Identification as having been delivered to Dr. Behrendt's house (1422-27).

Deputy Chief Inspector Vincent Thornton testified that he commanded the Identification Bureau of the Nassau County Police and supervised various technical aspects of the investigation. No identifiable fingerprints, other than those of Mrs. Behrendt, were found at the scene (1439). He was present at 5:30 A.M. on August 24th when the toppled refrigerator was righted and saw Detective Catapano find the torn shirt and keys (1446-47).

Leslie Lukash testified that he was a pathologist and Chief Medical Examiner of Nassau County. He performed the autopsy on the body of Dr. Behrendt (1558). In addition to minor abrasions the deceased received two major wounds: one, four inches long and one one-half inches wide at skin level (1561, 1565-66) and extending six to six and one-half inches in depth. This wound severed the heart, diaphragm and stomach and lacerated the upper portions of the liver (1561-62, 1566) and cut through three ribs (1561, 1567-68). The second wound entered over the left clavicle, crossed downward through the breastplate, extending for approximately six inches and lacerated the right lung (1560-61, 1569-70).

Either wound could have produced death (1564).

During the autopsy a fragment of cloth shirting (Exh. 40, Ident.) was found lodged in the crook of the armpit of the deceased and was turned over to the Technical Research Bureau (1573-74).

Detective Robert Rofheart testified that he arrived at Dr. Behrendt's house at 2:02 A.M. on August 24th (1704). He found that a twenty by thirty inch panel was cut out of the screen door leading from the porch to the kitchen (1722-23).

At about five a.m. he received Exhibit 17 (key chain with three keys) from Detective Catapano (1705). Between

seven and eight p.m. Rofheart spoke to the defendant in the homicide office concerning the keys and the prisoner admitted they were his but stated that he did not know "how they got there." (1707) He told Rofheart that he was at his sister's house in Hempstead during the evening of August 23rd (1707). Rofheart asked:

> "Well do you want to give me a statement to that effect and just what your activities were?" (1707)

Rofheart testified that Stovall "refused to give me a statement of any kind" (1708). Objection was taken and the jury was instructed to disregard the words: he refused to give me a statement (1709).

On August 26th Rofheart and Stalter went to the defendant's home in Jamaica and fitted two of the keys in Exhibit 17 in the front door lock and the lock of the rear door leading to the basement apartment (1715-16) and took photographs of the keys in the locks (Exhibits 25 and 26). They then went to Abraham and Straus and inserted the key bearing the number 358 in the locker with the corresponding number (1717-1720). Objection was taken to this testimony and overruled.*

On cross-examination Detective Rofheart testified that the defendant was brought to police headquarters between four and five p.m. on August 24th (1749) and was taken to Inspector Lada's office where he was interrogated (1751).

Rofheart saw no marks about the defendant's face or body at any time (1753-1755)—"not even when we took [Stovall's] clothes from him and put him in county clothes" (1756). The clothes were taken from him by "The lab men" who "stripped him right down" (1770-71). The police

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* Mr. Castellano: * * * I wish to enter my objection to the introduction of this testimony based on a previous objection with regard to the illegal search and seizure * * * I maintain that under the theory that I made the previous objection which I agree your Honor did not sustain, I make the continuing objection * * * (1712-13).

needed the clothes Stovall was wearing in order that they might be processed (1812).

After the prisoner admitted that the umbrella and keys were his, he said "I'll not tell you anything" (1763).

Rofheart was present the next day when Stovall was brought to the hospital. Present there were Chief Pinnell, Chief Farrell, Lada, District Attorney Cahn, Assistant District Attorney Delin and Detective Stalter (1791). Stovall was handcuffed to Stalter (1792). The two detectives waited outside Mrs. Behrendt's room with the prisoner while the others went in the patient's room to speak to her (1794). Some few minutes later the detectives took Stovall into Mrs. Behrendt's room (1798) where she identified the defendant as "the man . . . [who] struck my husband down and cut me" (1803). Chief Pinnell told the prisoner to "say these words" (1805) for voice identification (1803).

Detective Rofheart was present when Dr. D'Angelo, the psychiatrist, examined the prisoner (1813).

Charlie Rice testified that he was the landlord of 111-10 145th Street in Jamaica. Stovall rented "the whole complete basement" and was given keys to the front door and the rear cellar door of the basement (1866).

On August 24th officers came to the house. They went down to Stovall's room and took a shirt (1876, 1887-1892). Officers came back two days later and again searched Stovall's apartment, removing a diary and another shirt (1876, 1893).

Stovall had never given Rice permission to let the police officers into his apartment (1875) and Rice did not give the officers permission to insert keys in the locks to the front and rear basement doors (1882).

Rozier Brown testified that he lived at 85 Wellington Street in Hempstead. Shirley Stovall, to whom he was engaged on August 23, 1961, also lived in the building.

The defendant came in at about 9:00 P.M. (1943) on August 23 and Brown and the defendant sat together and talked until about 10:30 or 10:45 P.M. (1913-1914). They drank a pint of brandy together (1913).

Stovall left at about 10:45 P.M. to get a train back to Jamaica (1915). When he left he was wearing a white long sleeved shirt (1917), black pants (1921), hat and shoes (1917). He was also carrying an umbrella (1917-18).

He returned at approximately 1:00 P.M. (1919) and was wearing a white jacket, "like doctors [or] cooks wear" (1920). He was wearing no shirt or undershirt under the jacket (1928). His trousers appeared to have blood on them (1922).

Rozier Brown and Shirley asked the defendant what had happened.

"So he started telling us about—he says, 'You won't believe this. It was the worstest dream I ever had in my life.'

"He started talking about a dream so we asked him what happened. And he said he went to the train station and—let's see—he started to the train station, I think, and he saw a man or met a man or something. Anyway, the next thing you know, he was in the train station and he was on a train, and he said it seemed like the train disappeared and then he was in a car or something, he was in a car, and the car stopped, and everything—it was all confusing—couldn't make no sense out of it first. So I told him, 'Look if you lay down maybe tomorrow morning when you wake up you can tell us what happened.'

"The next morning he woke up it was the same thing again. So he said he thought he heard—he was walking down the street and he thought he heard a woman holler, a woman screaming, and the way he was talking, you know, you could tell it sounded like it was all confusion you couldn't make heads or tails of what he was saying at first. And then he said something like he heard a woman screaming and he said he ran in this house and there was a man laying there in a pool of blood. And so we said, 'A man in a pool of blood?'

He said, 'Yeah, I never seen so much blood.' And then a lady was screaming and hollering. He said she said something to him and he said he told her, 'Lady, you can't hurt me. I'm here to help you. The Lord won't let you hurt me.

"Q. The who? A. 'The Lord won't let me hurt you. I'm here to help you. And that's all he remembered until he was home. That's as much as he said. (1923-26).

Q. Did either you or Shirley in your presence ask him where he had gotten the jacket? A. Yes.

Q. What did he say? A. He doesn't seem to know. He just said—at first he looked down at himself like this (indicating). He said, 'Jacket?' He said, 'Where is my shirt?' Like that, as if he didn't even know he had the jacket" (1927).

Brown had gotten drunk with Stovall "a few times" (2004). In the evening of August 24th, Stovall "talked like he was high but he didn't talk like he usually talked when he got high" (2031).

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Over objection of defense counsel (2040) the white jacket was received in evidence as People's Exhibit 30 (2041).

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Dr. Frances Margaret Behrendt testified that she was a Radiologist and that she and her late husband, Dr. Paul Behrendt, resided at Pine and Clinton Streets in Garden City.

At around midnight of August 23rd her husband came into her room and awakened her (2052-53). She heard two "little thuds" coming from downstairs (2056). Her husband walked downstairs and she followed him not more than five minutes later (2057-58).

She saw her husband standing in the kitchen with a telephone receiver in his hand. Immediately nearby she saw a tall Negro with outstretched hand (2058, 2061).

Mrs. Behrendt jumped, head on, upon the intruder and was stabbed and fell to the kitchen floor (2059, 2062). The next moment she saw her husband on the floor with a broken knife lying next to him (2059). She knew her husband was dead (2059, 2062).

While she lay upon the floor, the assailant kept stabbing her in the back (2063, 2067) and threw the refrigerator over in her direction (2064).

While lying on the kitchen floor she heard the assailant walking around the room speaking rapidly but clearly in a high pitched voice (2065). The assailant was speaking about "religion" (2065).

She lay upon the floor for about fifteen or twenty minutes and heard the assailant walk about in the kitchen and dining during which time the assailant "kept on talking" but Mrs. Behrendt could not repeat what was said (2064, 2067-2069).

Mrs. Behrendt identified the defendant as the assailant (2075). She also testified, without objection, that she had seen the defendant on one other occasion, in the hospital when Stovall was accompanied by the police (2076).

Over objection (2084-85) Mrs. Behrendt testified that People's Exhibit 30 was a jacket similar to those worn by her husband (2085).

On cross-examination Mrs. Behrendt stated that after she was stabbed, the assailant kept walking back and forth and talked incessantly. He also sat down in a dining room chair (2220-24).

On the day Stovall was brought to her hospital room, she was first told "they would bring a suspect" in (2268).

Sergeant Timothy Ring of the Nassau County Police testified that while in Police Headquarters on the evening of August 24th, he noticed red stains on Stovall's shoes (2338-2340). He removed the shoes at 8:30 P.M. (2344) and turned them over to Detective Rieder of the Technical Research Bureau for examination (2343).

On cross-examination Sergeant Ring testified that he physically removed the shoes from the prisoner (2351). During the hours, between 4:30 and 8:30 P.M. when he had

the defendant under observation, he saw no bruises or marks upon the body of the prisoner (2354-56). During the early part of the interrogation of the prisoner, "he kept saying he didn't remember" (2374).

Detective Fred Catapano (testimony resumed, see supra p. 23) testified on cross-examination that he went to the defendant's home in Jamaica on August 24th and after speaking to the landlord, Charlie Rice, went to the defendant's room, was admitted by Rice and removed Exhibits I, J, and K (a shirt, pillowease and bedsheet) (Ident.). He did not have a search warrant and the defendant was not present at the time (2395-98). At the request of defense counsel the articles were impounded (2399).

After Catapano removed the articles from the defendant's room he took them to the Chinese Laundry (2416-17).

Detective Eugene Rieder of the Technical Research Bureau of the Nassau County Police testified as an expert witness that he examined Exhibit 16 (the shirt found under the refrigerator) and that it was stained with human blood of Group A (2460). Part of the front portion of the shirt was torn out (2461). Exhibit 40 (the piece of material found in the armpit of the deceased) matched the torn out portion of the shirt (2468-74) and was stained with blood of Group B (2466). Dr. Behrendt was Group B (2467).

Rieder also identified Exhibit 21, a T-shirt with the laundry mark "264" as stained with blood of Group A (2478-81).

Rieder also tested Exhibit 31, a pair of black trousers given him by Captain Hynes at 5:05 P.M. on August 24th, as bearing blood stains of Group A (2490-92). He also examined Exhibit 30, and Exhibit 35 the white jacket and the hat and found them stained with human blood, although the amount of blood was insufficient to permit identification by blood group (2496-99); (2500-2505).

Defense counsel repeated his continuing "constitutional objection" to Exhibit 31 (2493) Exhibit 30 (2499), and Exhibit 35 (2505).

The shoes taken from the defendant by Sergeant Timothy Ring were also examined and bore human blood (2507-09)

and were received in Evidence as Exhibit 46 with "no objection" (2510).

The broken knife handle and blade (Exhibits 22 and 23) were stained with blood of Group B (2519).

Without objection Detective Rieder testified that he took "fingernail scrapings" * from the defendant at 4:55 p.m. on August 24th in the Homicide Squad office in Police Headquarters (2784). All the scrapings from the ten fingers were positive for blood (2785).

Rieder also examined the clothing worn by Stovall at the time of his arrest and found it negative for blood (2786-87).

On cross-examination and after refreshing his recollection, Rieder testified that Stovall's socks were stained with blood belonging to Group A (2792-94).

At the time he took the fingernail scrapings he noticed no bruises, lacerations or contusions upon the defendant (2841-43). Rieder said nothing to the prisoner other than "the fact I was going to take fingernail scrapings."

It was also brought out upon cross-examination that Rieder had examined a pair of undershorts belonging to the defendant (2866, 2878-79, 2913) and found blood of Group A (2878).

Upon redirect examination the People put the undershorts in evidence as Exhibit 60 over the following objection:

> Mr. Castellano: . . . I have to make, I believe, a continuing objection with regard to the Mapp case. I don't know whether or not these shorts were taken from the home of the sister when they went down there. If such were, if they were taken from the body of the defendant of course there is no objection, but if they were taken from the house the objection on the constitutional ground remains, Judge." (2920-21)

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* "We take a file and we scrape out any material that is lying underneath the person's fingernails." (2781-82).

The socks were then offered in evidence and received as Exhibit 61 over "the same objection" (2922-23).

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After Detective Rieder concluded his testimony, defense counsel moved to dismiss the indictment on the ground the grand jury testimony of Rieder (Exhibit 2 for Identification) showed that blood had been taken from the defendant on August 28, 1961 . . . at a time after his arraignment (2936-39). The motion was denied.

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Rene Girodias testified that he lived at 90 Pine Street in Garden City about four houses from the corner of Clinton and Pine.

Shortly before midnight on August 23rd he heard screams and the breaking of glass (2941-42).

Later he saw a man wearing something white (2947) standing on the corner of Clinton and Pine, either yelling or screaming (2946, 2963-4).

Joseph J. McGuire testified that he was employed at the Oasis Bar and Grill at 433 Clinton Road in Hempstead.

He first saw the defendant at approximately 10:30 P.M. on August 23, 1961 (3022).

When the defendant came in he went to the telephone booth and made a call. When he finished the call he came out and said to McGuire, "How come nobody talks to me when I ask questions?" Stovall then asked McGuire for a container of coffee and asked McGuire to telephone for a taxi (3023-24). Stovall and McGuire had a dispute over whether the coffee was paid for and then Stovall went outside and got into the taxi. (3024) Stovall had forgotten his umbrella and McGuire brought it to him and said, "Here's your umbrella, Johnny" Stovall said, "Don't call me Johnny. My name is Teddy" (3024-25).

After Stovall left the telephone booth he asked how he could get to an address in Uniondale. McGuire and a "couple of fellows" tried to tell him how to get there but Stovall "was all jumbled up" (3027-28).

Before the defendant left the bar, McGuire found a slip of paper in the telephone booth that had a phone number written on it. McGuire gave the number to the police at about 8:30 A.M. on August 24th (3029-31).

About fifteen or twenty minutes after the defendant left in the taxi, McGuire saw him walking past the bar (3026, 3031).

About two hours later Stovall returned to the bar wearing a white jacket. Stovall told McGuire that he got the jacket . . . "off a day man or a dead man. I didn't know what he said." Stovall asked for a drink but McGuire refused to serve him anything but beer. Stovall drank the beer and left (3031-3033).

On cross-examination McGuire repeated that he had advised the police at 8:30 A.M. of the contents of the slip of paper found in the telephone booth and had the impression that he subsequently gave the slip of paper to the police. McGuire recalled only that there was a telephone number on the piece of paper (3036-3040).

When McGuire first saw the defendant at 10:30 P.M. on August 23rd, Stovall "seemed to be all befuddled like he might be coked up or something." He did not appear to be intoxicated (3041); "he got a little belligerent and he started rambling and all . . . he didn't seem intoxicated. There was something the matter with the man. He was either doped up or drunk, but he wasn't showing the effects of being drunk all the time" (3050).

At the time Stovall was wearing a "pork-pie" hat similar to Exhibit 35 (3057) and McGuire thought Stovall was wearing a stripped shirt (3058). When the defendant returned two hours later he was wearing a white jacket (3056) and was wearing no shirt or undershirt under the jacket (3059).

Warren Van Gelder testified that he had been a patron of the Oasis Bar on August 23rd. In substance he corroborated McGuire's testimony as to the events which took place in the bar the first time that the defendant was there (3097-3106).

John J. Kelly testified that he was in the Oasis Bar with Van Gelder when the defendant came in. His testimony was in substance the same as Van Gelder's (3109-3123). He did not think that the defendant was drunk (3111).

Jack Kartee testified that he was the general manager of Larry's Taxi in Hempstead. On August 23rd at 10:45 P.M. he received a call from the Oasis Bar for a cab and car 22, driven by James Edmondston was dispatched (3131).

James Edmondston testified that he worked for Larry's Taxi. In response to a call, he went to the Oasis Bar, arriving just before 11:00 P.M. on August 23rd (3135).

A passenger got in the cab, "but didn't know exactly where he was going" (3136) but showed Edmondston a small piece of paper on which was written an address in Uniondale, possibly on Union Drive (3137).

After driving about a block Edmondston became concerned about whether the passenger could pay the fare and he told the passenger that the fare might come to about a dollar and a half. The passenger said something like, "it's just around the corner" (3138), and got out of the cab on Meriam Street, about a block from Clinton Street (3140).

Edmondston could not "definitely" pick out a person in the courtroom as being his passenger (3147). He thought his passenger was drunk (3158-59).

Kathryn Maus testified that she was being driven home on Clinton Street at about midnight on August 23-24th. She saw a negro wearing a white coat, hat and dark trousers standing in the middle of Clinton waving his hands (3167-68).

On cross-examination she stated that the person was yelling as he waved his arms but she could not hear what was being shouted (3174-75).

She watched the person walk down the middle of Clinton Street towards the Oasis Bar (3180-83). He was "weaving" from side to side as he walked (3185-87).

Walter Girodeau testified that he resided at 757 Union Drive, Unioñdale, Long Island. He was 62 years old and was employed in various hospitals as an orderly or male nurse.

On Wednesday August 23, 1961 he went to the Hempstead railroad station to meet a friend (3195). He started to drive away when the friend did not show up and he saw Stovall standing on the sidewalk in the rain. Stovall "made a motion," Girodeau said "Yes" and Stovall came over and got in Girodeau's automobile (3197-98). Girodeau drove the defendant to his sister's house on Wellington Street. When they arrived, Girodeau refused to accept payment for the ride; the defendant went into a liquor store and returned with a bottle (3201). They sat in the car drinking and talking (3202-03) and Girodeau asked the defendant over for dinner (3203). Stovall went into his sister's house for five or ten minutes and then the two drove off to Girodeau's apartment. There they ate, had a couple of drinks and watched television (3204-05). After dinner, Girodeau drove Stovall to his sister's house and left him off at a few minutes past eight p.m. (3209).

Between 10:00 and 10:30 p.m. Girodeau received a telephone call from Stovall who asked Girodeau to drive him to Jamaica. Girodeau told Stovall that he had lent someone his automobile but if Stovall would come to Girodeau's house he would drive him as soon as the car was returned. Girodeau did not see the defendant until the night of August 24th when he was brought to Police Headquarters "to point out the person" (3211).

While Stovall was with Girodeau he wrote out his Jamaica address on a slip of paper and gave it to Girodeau, who later turned over the slip of paper to the police (3216-18).

On cross-examination Girodeau testified that he committed no sexual or immoral acts with the defendant (3258, 3260) and that he was not at Clinton Street between 10:30 and 11:00 p.m. on August 23rd (3267-70). He denied picking the defendant up at that time to drive him to Jamaica (3270) and denied removing the defendant's shirt and

T-shirt and using them to cover his head as he committed "another" immoral act upon the defendant (3271).

On the morning of August 24th Girodeau received a telephone call from a detective (3279) and was taken down to the "Detective Bureau" at about 10:00 a.m. (3280, 3285). He did not know about the killing until about 2:30 p.m. on the 24th when he heard about it over his automobile radio (3281). Girodeau was "nervous" because the radio report said that the killer had worn a white jacket and Girodeau owned six white jackets (3282-84, 3289, 3292-93).

Girodeau denied giving Stovall a white jacket which defense counsel suggested Girodeau had taken from Dr. Behrendt's house (3304-05). Girodeau denied ever being in Dr. Behrendt's home or seeing Exhibit 22, the broken knife (3324) and denied putting "anything" in Stovall's drinks (3327).

On redirect examination Girodeau was asked if he had "improper relations" with the defendant and Girodeau said "No." He was then asked:

> Q. Now, if you did have such improper relation, [sic] this defendant would be the one that would be able to say so; isn't that a fact, just yes or no?

Defense objection was sustained but a motion for a mistrial denied. The court admonished the jury that the defendant had no duty, responsibility or obligation to make a statement or testify (3378-3381).

Shirley Stovall Brown, the sister of the defendant, testified as a People's witness that on August 23rd she lived at 85 Wellington Street in Hempstead (3455).

She first saw her brother on the 23rd when he came to the house at about six p.m., stayed for five minutes and then left (3455). He returned at about eight p.m. (3456) and stayed until about 10:45 or eleven p.m. when he left to go home (3460).

Stovall came back between 12:30 and 1:00 a.m. (3461-62). When he returned he was wearing the same trousers and hat that he wore earlier in the evening; however he was

not wearing his shirt or undershirt but was wearing a white jacket (3463-64).

He had a smear of blood on his face and blood on his trousers and socks (3465-67).

When the defendant came back, "he looked dizzy to me" (3462), "he looked drowsy and sleepy. He looked as if he was in a daze" (3463); ". . . he looked as if he was drinking and he was drunk and he looked dopey to me. I mean he looked as if he was just in a trance or daze or something. I never seen him look like that before." (3465)

She tried to find out from the defendant what had happened:

> "But I did talk trying to get out of him where he got the blood from and he was just telling me it was all like a dream. I couldn't figure out how a person could have a dream with blood on him. It was just like a dream. He saw this blood and this man lying in the blood and he heard this women cry and he ran in to help. He thought it was me and he ran in the house when he heard her cry. He thought that he'd go in and see what was wrong with me. And he went in and he saw this man on the floor in this blood and he slipped in it and the women came from nowhere and tried to hurt him. He said he bent on his knees and tried to pray for her and told her he only came to help, he didn't come to hurt her, that if he prayed that God wouldn't let her hurt him, that he would get out, he would go out and if she didn't want him to help he would go out about his business. So when he prayed for her he fell on the floor and he left out, and he constantly say it was just like a dream, it was just like a dream. So I asked him what kind of a dream, where did he get the blood from. So he said he slipped in it 'When the lady came and tried to kill me! (3471-73) * * * I figured he was so drunk that he just didn't know what he was talking about" (3474).

The next day Shirley questioned her brother again and he said:

> "No, there was no fight. I didn't see no fight. I only heard this women cry" and he went in to help her, "and I saw this blood lying on the floor and this man was there, and when I got in there this women came out of nowhere trying to kill me," and he slipped on the floor trying to help her, and she tried to kill him and he prayed for her and she fell and he walked out (3476).

The sister then took the defendant walking down Clinton Street to see where it was that Stovall had the "fight" the night before (3476-80). They were unable to find the house (3479) even though they passed the Behrendt house (3499-3504) which was only two blocks away from Shirley Brown's house on Wellington Street (3499).

On cross-examination the defendant's sister testified that Stovall had told her that he had met a man who was going to pay him to have homosexual relations with him (3545-46).

Michael Wowk testified that he was an official court reporter for Nassau County and that he stenographically recorded the interrogation of Theodore Stovall by District Attorney William Cahn beginning at 9:46 p.m. on August 24, 1961 (3630).

The transcript was read to the jury and admitted into evidence as Exhibit 67 with "no objection" (3633). The statement appears at folios 4732-4776 of volume III of the printed Record on Appeal.

On cross-examination Wowk testified that the typed statement reflected everything that transpired in his presence and that he saw nothing that transpired prior to 9:46 p.m. relative to the interrogation of Mr. Stovall (3645-46).

* * * * *

The People rested

* * * * *

Defense counsel renewed the motion for a mistrial based upon the prosecutor's question to Girodeau concerning whether the defendant would be "able to say" whether there had been improper relations between them. (3651-55; supra p. 40). The motion was denied.

A motion to dismiss the indictment on the grounds that it was based on hearsay, ". . . and upon all other incompetent and illegal evidence that appears from the grand jury minutes of Detective Stalter's, Detective Rofheart's and the other [grandjury] witnesses" was also denied (3656).

Defense counsel again moved to suppress the evidence seized from the defendant's home in Jamaica (3657-59) and further moved to suppress evidence thereafter obtained as the result of the illegal taking in Jamaica (3660-62).

The Court denied the motion stating: "I do not feel that there is any evidence in this case before the jury which either directly or indirectly flows from any illegal search and seizure that might have been committed by the authorities who were handling the investigation" (3662-63).

Defense counsel renewed his motion to suppress the trousers, shoes, hat, and socks of the defendant taken during the Hempstead search on the grounds that these items were not contraband or fruits of crime and were merely evidentiary. Items taken from the *person* of the defendant were specifically excluded from this application (3663-3682). The motion was denied.

A motion for a directed verdict of acquittal on Count I (felony murder) was denied (3683-85). A similar motion addressed to Count II (common law murder) was made (3685-3718) and denied after the defense rested (3987).

The Defense

Melvin Gaddy testified that he owned the premises at 85 Wellington Street in Hempstead.

He saw the defendant at about 4:30 or 5:00 p.m. on August 23rd sitting in an automobile in front of his house

(3723-24). There was another person in the car whom he could not identify (3726-27).

Later that night, or in the early morning of August 24th (3731) he responded to the defendant's knocking on the door and let him into the house (3732-33).

He asked Stovall if it was raining outside but he could not make out the defendant's answers (3734).

Stovall "... did look rather strange, out of the ordinary, out of the Theodore that I really knew. He did look strange" (3735) "... He seemed to not know where he was going or what he was doing. And his speech was mumbly. And at all other times I could understand him clearly" (3737-38).

> Q. In your opinion, were his actions those of an irrational person?
>
> A. I think so, yes.

On cross-examination Gaddy testified that he had refused to sign a statement for the police when previously requested (3740-43).

He had seen the defendant on two or three occasions prior to August 23 (3751).

When he let the defendant into the house late on August 23-24th, he noticed that the defendant's "shirt top piece" was white (3752). He didn't notice any blood on the defendant's clothing but he did notice blood or a spot on his right temple (3752-53).

Deputy Chief Inspector John Lada was recalled as a defense witness.

He brought the defendant to police headquarters, arriving at 4:45 p.m. on August 24th (3764). Prior to interrogation, the prisoner's fingernails were scraped by Detective Rieder and his fingerprints and palm prints were taken (3765).

During the five hours between 4:45 and the "Q. and A." which was taken at 9:45 p.m., Lada questioned Stovall for an hour or an hour and a half (3766) and was present with the defendant for two and one-half or three hours (3768).

He was also present during the "Q. and A." statement and in substance Exhibit 67 conforms to his recollection of what transpired (3769-71).

During the time that the defendant was in his presence Stovall was not "touched" by any officer with a view towards injuring him (3772-73). When the prisoner's undershirt was removed, Lada saw no marks or bruises (3773-74).

During the interrogation the prisoner was "absolutely rational" (3776).

A psychiatrist was called to Police Headquarters and examined the prisoner at about midnight on August 24-25th. He was called by District Attorney Cahn as part of "regular procedure." The prisoner was examined by the psychiatrist in Lada's office (3778-83).

On cross-examination Lada stated that it is "routine" to have a psychiatrist examine defendants in first degree murder cases (3801-02).

* * * * *

The defense rested and moved to dismiss the indictment on the ground that the People failed to prove his guilt beyond a reasonable doubt and "on each and very ground provided for in the Code of Criminal Procedure." The motions were denied and exceptions granted (3805).

People's Rebuttal

Ernani D'Angelo testified that he was a psychiatrist with "about the highest rating you can receive" (3813). He thought he examined the defendant on February 17th (3813); he thought again, and decided it was January 17 (3814); he examined his report and decided he saw the defendant on January 18th (3814). After it was called to Dr. D'Angelo's attention that January 18th was the date of his report, the Doctor reflected and concluded that he had begun his examination of the defendant at 11:55 p.m. on August 24, 1961 (3815).

The doctor was then asked an "hypothetical question," from folio 3816 for a dozen or so pages, at the conclusion of which the doctor opined:

> "I state that the defendant knew the nature and quality of his act and that he knew it was wrong" (3861)*

and that the defendant "had the capacity to premeditate, deliberate and intend to kill Dr. Behrendt" (3861-62).

The doctor further testified:

> "... in a general way I can state that I can see nothing in the patient's behavior from the time he came into Hempstead throughout that evening or even the next day which would indicate that any time he was out of contact or irrational in his behavior" (3862-63).

Repeated objections were taken to the doctor's testimony on the grounds that the hypothetical question was incomplete and improper as to form (3841-3861; 3863-64) and on the ground that the entire testimony was improper rebuttal since the defendant had not raised an issue relating to his sanity (3865-3914).

During the course of the colloquy concerning D'Angelo's testimony the District Attorney offered to have the doctor's testimony stricken if counsel or the defense would stipulate that no question of insanity was present in the case (3885). Defense counsel refused to so stipulate stating that the basis for the defense was:

> "My theory in this case is that Girideau committed this crime. He drugged this man [Stovall]. He placed his garments in there. He [Girideau] did all these things actually to cover his own crime. This man [Stovall] is not insane." (3889)

The defense attorneys maintained that they had not raised a defense of insanity, however when pressed by the Court as to whether they would enter into the stipulation sug-

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* Through typographical error the folio numbers at p. 1287 of the printed record (Volume II) are listed as "5938, 6038 and 6138." It should be "3859, 3860, 3861."

gested by the Prosecutor, counsel declined stating that the jurors still had the right to ask themselves, "Could this guy go nuts and nobody else knows [sic] about it?" (3893) The Court overruled the defense objections.

The direct examination of the doctor resumed and he was asked to again answer the hypothetical question based on the facts stated in the question and "your observation of the defendant, and without reference to anything the defendant may have told you in the interview." (3915) The doctor stated "definitely" that

> "My opinion is that he knew the nature and quality of the act and that he knew it was wrong. He at no time, as I have mentioned before, was he out of contact and he always was aware of what he was doing.
>
> Q. Now at the time of the alleged killing of Dr. Behrendt which I have asked you to assume from the facts, can you state on the basis of this assumed state of facts and your observations of this man, without referring to anything he might have told you, whether or not he had the capacity in your opinion to premeditate, deliberate and intend to kill Dr. Behrendt? A. He did.
>
> Q. And what do you base that on? A. On the fact that he did exactly what he intended to do, to kill Dr. Behrendt" (3916-18).

Objections and motions to strike were overruled and a motion for a mistrial was denied (3918-19). The doctor was then asked:

> Q. You are basing your opinion merely on an assumed state of facts as I have given them to you, is that correct? A. That's exactly it. (3920).

Both sides rested.

After summing up on isolated bits of evidence defense counsel argued to the jury concerning Girodeau's involvement:

"Is there anybody on this jury that isn't convinced beyond a reasonable doubt that this character is as queer as a three dollar bill. * * * Where a witness testifies and you find that he lies with regard to any one point. . . . you are entitled to disbelieve his entire testimony * * * And I'll show you where Gerodeau lies. (4038-39)

"Gerodeau is the guy who says, 'I was afraid because I got six white jackets' . . . but he's afraid because he got six white jackets or five white jackets. He's not afraid because he knows Stovall is involved, the fellow he's been with the night before. He says to the police in the statement he gives them and he says here, 'The last time I heard from Stovall was he called me around 10, 10:30'

* * * * *

"That's the last time he saw of Stovall. Why does he say this? Because if he saw more of Stovall after that time he's right close up to the time of the commission of the murder. I don't know whether he did it or not. But he's a better suspect than this guy is . . . (4041)

". . . And then later the bartender made a call and called a taxicab. Now when did our friend Mr. Gerodeau receive this telephone call? That lying pervert never got that call because he couldn't. He wasn't home. He was right in the vicinity waiting, for Stovall near his sister's house. (4042)

* * * * *

"What is he* doing in this queer's house for five years? Is he the guy that needs the dope? This is what I think. I think that Gerodeau has been clipping and stealing dope on his job wherever he could. I wouldn't be surprised if Gerodeau knew Dr. Behrendt (4044-45)

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* It has been brought out at trial that a boarder had been living at Gerodeau's house for five years.

"At any rate, Gerodeau was with this defendant throughout the whole evening outside of the time he dropped him off at his sister's house, and when I asked him about the blow jobs he denied it. But that's exactly what happened. He got this man's shirt and T-shirt off his back on that pretext and he did this job, this pervert with the high pitched voice who went to college, who finished high school, who speaks clearly and distinctly in as high a pitched voice as you want, and maybe a queer hasn't got the strength to do this. This queer has been working for ten years in psychiatric wards * * * They [the police] didn't do anything about checking Gerodeau. (4044-46)

Counsel continued in this vein and then referred to the fact that in Stovall's statement,

"There is not one admission in there. There are 15 or so of the 22 pages of Mr. Cahn saying, 'You're a liar. Why don't you tell the truth?'" (4058)

Mr. Castellano then stated that he tried to show that the defendant had been drunk or drugged but that he had not presented an insanity defense, although he could have had "... four psychiatrists here. They don't cost a dime. The state pays for it" (4061).

Counsel finally argued, assuming Stovall killed the deceased, that there was no premeditation, deliberation or intent (4071-73).

On the People's summation Assistant District Attorney Spitzer discussed the evidence in the case, including reference to the fact that the defendant's statement to District Attorney Cahn (Exhibit 67) was inconsistent with evidence adduced at trial and also that the defendant's statement did not support defense counsel Castellano's theory of the murder (4152-65; 4168-75).

The Charge

Judge Kelly submitted to the jury the three counts of the indictment: common law murder, felony murder and attempted murder of Mrs. Behrendt.

He then marshalled the evidence including:

> "He [Detective Rofheart] stated that, 'When we got in the [hospital] room Inspector Pinnell asked Mrs. Behrendt if this was the man. She said, 'Positively that's the man. He struck down my husband and attacked me.'"
>
> "The defendant was also told to speak, which he did, because of voice identification," said Detective Rofheart. "She said she had heard him speak the night in question or the night of the murder" (4266-67).

After marshalling the evidence Judge Kelly charged as to the law on the counts of the indictment, adding the lesser included crimes of murder in the second degree and misdemeanor manslaughter (4363-70).

The jury was charged to consider "mental stress" and consumption of alcohol as bearing upon the "capacity to think" and form the specific intent necessary for murder in the first degree (4360-61, 4371-75, 4381).

The Court then specifically charged the jury on insanity as a defense to the crimes charged (4388-95), including a specific reference to Dr. D'Angelo's opinion concerning the defendant's capacity (4393).

The Court, in marshalling the evidence referred to the testimony of Mr. Wowk (the stenographer), "who testified as to the authenticity of the statement that he had taken from Mr. Stovall" (4322) in which the defendant admitted that the torn shirt and keys were his but denied any knowledge of the crime (4323). No charge was given relating to the voluntariness of the statement.

• • • • •

Defendant's Requests to Charge, Numbers 10 (f. 4419) and 15 (4421) dealt with intoxication as a defense to those elements requiring specific intent. No requests were made on the subjects of insanity or coerced admissions and statements.

• • • • •

The jury commenced its deliberation at 2:52 p.m. and returned at 5:17 with a request to see two photographs of the scene and to have Mrs. Behrendt's testimony read (4431). The reading was completed at 7:20 p.m. when the jury went to dinner. At twenty minutes past midnight the jury retired for the night, resuming deliberation at 9:10 a.m. At 12:48 p.m. the jury returned and requested a reading of the indictment and "definitions" of the crimes (4437-49). The jury returned to the jury room at 1:12 p.m. and came back to the courtroom at 4:10 p.m. (4450) to request the "complete charge" on the felony murder count, including intoxication (4450-57). The jury retired at 4:35 p.m. and returned at 9:20 p.m. to request a rereading of the charge on Count II (common law murder) (4461-71). The jury retired at 9:35 p.m. and returned at 10:00 p.m. with the following verdicts:

> Count I (felony murder): guilty as charged;
>
> Count II (common law): guilty of murder in the second degree;
>
> Count III (Attempted murder in the first degree): guilty as charged.

The jury made no recommendation for mercy on Count I.

On the day of sentence defense counsel moved pursuant to Section 481 of the Code of Criminal Procedure to have the defendant examined to determine his sanity (4500). Counsel stated that the defendant had never been examined by a psychiatrist other than D'Angelo (4500-04) and that the Warden of the County Jail had advised counsel that "'. . . this defendant has not acted in any wise such as a

defendant who was convicted of murder in the first degree. He talks to no one. He stays completely by himself. He is constantly reading the Bible. He makes no outward display of any kind" (4514). The Court ordered the examination.

On September 6, 1962 the defendant appeared in Court and portions of a psychiatric report were read into the record. The report apparently indicated only that the defendant, at the time of the trial, was capable of understanding the charges and preparing his defense (4532-45).

The defendant was then sentenced to death on Count I, forty years to life on Count II and a consecutive sentence of twelve and one-half to twenty-five years on Count III (4545-51).

The Appeal

Upon appeal the defendant was reassigned the same attorneys who were assigned to represent him at trial.

Appellant's Brief, Point I (pp. 3-15) argued that the evidence was insufficient to justify the verdicts on the three counts.

Point II (pp. 16-24), that "the evidence did not justify the finding that the defendant was able to formulate the required specific intent." Counsel argued that the defendant was "intoxicated to a degree that left him stunned, disoriented and mentally helpless" (Brief, p. 24).

In Point III (Brief, pp. 25-34) Appellant argued that the trial court erred in its ruling that the "poison fruit" rule did not apply to New York and urged that the items seized at the time of the defendant's arrest in Hempstead, and introduced into evidence by the People, were tainted by the initial unlawful search and seizure in Jamaica. Counsel also argued that the hat and trousers seized in Hempstead were neither the fruits or instrumentalities of crime and, as "merely evidentiary" matter were inadmissible.

Appellant's Point IV (Brief, pp. 34-37) argues:

"After arraignment the defendant was taken to the hospital to be identified by the victim's wife and he was then and there made to speak under circumstances amounting to testimonial compulsion. * * * What transpired at the hospital was after the defendant had been arraigned . . . and while the defendant was without counsel * * * "

Appellant's Point V (Brief, pp. 37-42) contended that it was error to allow the People to put on rebuttal evidence "as to the defendant's sanity although the defense never raised that issue." Counsel argued that:

". . . from beginning to end, the theory of defense was: that if the defendant committed the crimes charged, he was so intoxicated or drugged . . . as to be unable to formulate a criminal intent" (Brief, p. 37)

and that since the defendant had not rebutted, or attempted to rebut the presumption of sanity it was error to allow Dr. D'Angelo's testimony. Counsel argued that the defendant was prejudiced by D'Angelo's testimony because:

"This unprovoked, unanticipated and eleventh hour stratagem on the part of the People, threw the defense completely off balance; moreover it unjustifiedly permitted the People to bolster and fortify the presumption of sanity to the detriment of the defendant" (Brief, p. 42)

Points VI (Brief, pp. 42-49) and VII (Brief, pp. 49-53) dealt with alleged errors in the Court's charge and improper questioning of witnesses.

The People's Brief

The People's Brief, Point I (pp. 37-41) argued that the evidence was sufficient to sustain the conviction on all counts and the defendant was not so intoxicated so as to negate the intent necessary to support the verdicts.

In Point II (pp. 41-47) the People conceded that the Jamaica search was unlawful (p. 47) and that the ruling relative to the non-applicability of the "prison fruits" rule was erroneous (pp. 43-44). The People argued however that:

1. The defendant failed to meet *his* burden of proof in showing that the Hempstead arrest and incidental search flowed directly from the evidence and information gathered in Jamaica (p. 42).

2. On the basis of the trial record—as distinguished from the hearing on the motion to suppress—Detective Rofheart was supposed to have learned Stovall's identity and address from the bartender, McGuire, and Girodeau prior to the arrest (p. 45). The People conceded that the record was silent on the subject of how and when the police learned that the keys found at the scene of the killing matched the locker assigned to Stovall at Abraham and Straus.

3. The People suggested that the appeal be held in abeyance and the case returned to the trial court for a further hearing with regard to the latter point if necessary (p. 46).

Points III and IV of the People's Brief dealt with the other points raised by Stovall's counsel.

U. S.

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Supreme Court of the United States

October Term, 1966

No. 254

THEODORE ROOSEVELT STOVALL,
Petitioner,

vs.

Honorable WILFRED DENNO, Warden,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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vs.

Honorable WILFRED DENNO, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Statement

Theodore Roosevelt Stovall was indicted by a Nassau County Grand Jury on August 31, 1961, for Murder First Degree (2 cts.), as well as Attempted Murder First Degree.

The first count of murder charged Stovall with killing Dr. Paul Behrendt by stabbing him to death with a knife during a burglary in the Doctor's Garden City home.

The second murder count has reference to the same homicide but the charge is styled in common law terms.

The third count has reference to the petitioner's attempt to murder Dr. Frances Behrendt, the wife of the deceased, at the same time.

After a jury trial, Stovall was convicted in the Nassau County Court of Murder First Degree (felony murder), and Murder Second Degree under the common law charge as well as Attempted Murder in the First Degree.

The death sentence was imposed on September 6, 1962, for Murder First Degree whereas Stovall was sentenced to 40 years to life for Murder Second Degree and 12½ to 25 years for attempted Murder First Degree with the direction that the last two sentences be served consecutively.

The death judgment pursuant to New York procedure was reviewable directly by the New York State Court of Appeals where the verdict and sentence was unanimously upheld (13 N.Y. 2d 1094). So much of the appeal as related to Murder Second Degree and Attempted Murder in the First Degree was dismissed because the review should have been by the Supreme Court, Appellate Division, Second Judicial Department.

The remittitur was amended to show that Stovall's constitutional rights had not been violated (13 N.Y. 2d 1178).

No application was ever made for a writ of certiorari. Thereafter, an application was made in the United States District Court, Southern District of New York, for a writ of habeas corpus, which application was denied by Judge Wyatt on July 14, 1964.

A timely application for a certificate of probable cause and leave to appeal as a poor person was granted on September 9, 1964, and a notice of appeal was filed on September 10, 1964.

On January 21, 1965, argument of the appeal was had before Circuit Court Judges Moore, Friendly and Marshall, and on March 31, 1965, the order was reversed "with instructions that the writ issue unless, within a reasonable

time, New York affords Stovall a new trial," because the police authorities of Nassau County unconstitutionally interfered with Stovall's Fifth and Sixth Amendment rights. Judge Moore dissented.

A petition for re-hearing en banc was granted and the order of the court was vacated by the en banc decision.

By order of this Court dated June 20, 1966, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was granted. By the same order, permission to proceed as a poor person was granted.

At the trial and in the New York State Court of Appeals, petitioner was represented by Nicholas Castellano, Esq.

In the District Court, the United States Court of Appeals and in this Court, petitioner is represented by Anthony F. Marra, Esq., Legal Aid Society of New York (Leon B. Polsky, Esq., of counsel).

The People of the State of New York were represented at the trial by Assistant District Attorney Harold Spitzer of the Nassau County District Attorney's office. In the New York State Court of Appeals, the People were represented by Nassau County Assistant District Attorney Henry P. DeVine. The Warden has also been represented throughout by Henry P. Devine, Assistant District Attorney.

Opinions

The District Court opinion of Judge Wyatt (* 14-18) is not reported. The panel opinion of the United States Court of Appeals (24-35) is unreported. The en banc opinion of the Court of Appeals (37-59) is reported at 355 F. 2d 731.

Jurisdiction

The authority of this Court to entertain the appeal will be found in 28 U.S.C. 1254(1).

Constitutional Provisions Involved

Dr. Paul Behrendt was murdered in his Garden City home during the night of August 23, 1961. His wife, Frances, also a medical doctor, was nearly murdered by Stovall at the same time.

Stovall was arrested at 4 p'clock the afternoon of August 24, 1961, at his sister's home in the adjoining community of Hempstead, and was arraigned August 25, 1961, before a magistrate, charged with First Degree Murder for stabbing Dr. Paul Behrendt to death at which arraignment, he was fully and completely advised of his right to counsel and to a formal hearing.

The conceded facts are that Stovall advised the magistrate that he would retain counsel of his own choosing so the formal arraignment was adjourned to August 31, 1961, to permit Stovall to retain counsel.

The arraignment proceedings occurred in the Magistrate's Part of the First District Court, Mineola, County of Nassau. Stovall was remanded into the custody of the Warden of the Nassau County Jail situated in nearby East Meadow. Transportation of the prisoner from the Magistrate's Court to the jail was the responsibility of the arresting Nassau County detective. On the way from the court to the jail, the authorities stopped at the Mineola Hospital some few block from the court where the prisoner was taken before Dr. Frances Behrendt in her hospital room for identification purposes.

Proof of this fact was established at the trial *without objection.* The lawfulness of this item of evidence, *i.e.* Dr. Frances Behrendt's trial testimony relative to the showup in her hospital room, was actually challenged for the first time in the United States Court of Appeals. It was there argued that with the commencement of the criminal proceeding against the accused, his right to counsel

attached and the showup thereafter not only interfered with Stovall's right to counsel but also compelled Stovall to incriminate himself.

Specifically, the case calls up the Fifth, Sixth and Fourteenth Amendments to the Constitution insofar as they involve the right of an accused to counsel, and his privilege not to incriminate himself with reference to a "showup" after the criminal proceedings have commenced. Also, it is contended that because Stovall was the only negro in the hospital room, the identification procedures fell below the minimum standard circumscribed by the due process provisions of the Fourteenth Amendment.

It is to these points that the brief shall be essentially directed.

The Evidence

Helen Sims (396, *et seq.*) was a switchboard operator in the Garden City Medical Center and, at about 12:45 A.M. she received a frantic call for help from Dr. Frances Behrendt who was screaming over the line, "'Murder, murder, murder'" (400). Immediately, Mrs. Sims put a call through to Lieutenant Hausser of the Garden City Police Department.

Lieutenant Edwin F. Hausser (259, *et seq.*) is a twenty-nine year veteran of service with the municipal police force for Garden City. According to Lt. Hausser, he was on duty when he received a call from Mrs. Sims as a result of which he went to the Behrendt residence at 79 Pine Street in Garden City arriving at 12:55 (264). Lt. Hausser immediately surveyed the situation and to gain entrance was compelled to break his way into the premises, which he did, arriving in the kitchen.

According to the Lieutenant, he discovered the deceased, Dr. Paul Behrendt, lying dead on the kitchen floor. Immediately, he conducted a search of the premises and on the

second floor he discovered the victim's wife, Dr. Frances Behrendt, in the upstairs bedroom, in an hysterical condition completely covered with blood.

It was the uncontradicted testimony of Lt. Hausser that a survey of the premises revealed that all of the doors were locked, but he discovered a break in the screen (266, 284, Peo.'s Ex. 5) and he also observed that a window had been pushed open (286, Peo.'s Ex. 5).

Continuing, Lt. Hausser described for the jury the death scene as follows: First, he observed a light on over the kitchen sink (327) and he also observed that a light was on in the cellar (331) and also that there were lights on in the dining room and in the hall (333).

Lastly, the witness noticed that in the deceased's hand as he laid on the floor dead, covered with blood, was the telephone receiver which, of course, was off the hook (300). This most dramatic scene was pictured in People's Exhibit 9.

In the meantime, and before any further search of the premises had been conducted, Lt. Hausser put a call through for a neighbor of Dr. Behrendt, a Dr. Foehr who arrived at the murder scene almost immediately.

Dr. Joseph E. Foehr (378, *et seq.*) was a friend of the deceased and according to the witness, he arrived at the scene of the murder shortly after 1:00 A.M. where he found Dr. Behrendt lying on the floor in the kitchen and he quickly determined that Dr. Paul Behrendt was dead. Immediately, he ran upstairs where he found Dr. Frances Behrendt in the bedroom hysterical and in a state of shock as a result of the terrible knife wounds and the huge loss of blood. According to Dr. Foehr, he diagnosed her condition as critical and immediately made the necessary arrangements to have her transferred to the Nassau Hospital, which was in the adjoining community of Mineola.

Christian Siegmann (477, *et seq.*) was the next witness called by the prosecution and he was summoned for technical reasons, it appearing that he was a surveyor and he had prepared a floor plan of the death scene as well as the surrounding neighborhood and People's Exhibits 14 and 15, which fairly represented the inside of the Behrendt home, as well as the outside, were introduced into evidence through this witness.

The first really important witness called by the prosecution was Detective Fred Catapano (514, *et seq.*) who was a detective in the Nassau County Police Department. According to Detective Catapano, he arrived at the scene at about 2:00 A.M. and he immediately went into the kitchen where he observed the body of the deceased, as well as an overturned refrigerator. According to Detective Catapano, the kitchen was in a shambles (517).

Almost immediately, Detective Catapano was directed to canvass the neighborhood for the murderer and he did this continuously until about 5:30 A. M. when he returned to the scene of the stabbing. At this point he re-entered the kitchen and he observed that the overturned refrigerator had been righted and on the floor where the refrigerator had been, he noticed a ripped and bloody shirt. Inside the shirt was a key chain with three keys (518-519) which the witness recovered and immediately turned over to Detectives Stalter and Rofheart who, at this point, were jointly carrying the case (525).

The key to this case was the keys for it led the investigating authorities to the Abraham & Straus people where it was determined that the key in question belonged to a Theodore R. Stovall who was carried on their employment records as a resident of 111-10 141 Street, Jamaica 36, New York.

At this time the prosecution called John R. Randall (559, *et seq.*) who swore he was the head of the Record

Section for Abraham & Straus and he determined from the store employment records that on the evening of August 23-24, 1962, Theodore R. Stovall was an employee of the company and when hired he was assigned Locker 358 for which he received a key.[1]

The next witness called by the District Attorney was Arievenia Paschal (624, *et seq.*) who declared under oath that she was a friend of the defendant, Theodore R. Stovall, and from time to time she used to take his clothes to a Chinese laundry on Sutphin Boulevard, about five blocks from her home which was at 111-10 145th Street, Jamaica.

From the laundry mark found on the shirt on the kitchen floor, the police were led very quickly to Go Yee, who ran a Chinese laundry at 112-20 Sutphin Boulevard, Jamaica.[2] Mr. Yee was shown People's Exhibit 16, the bloody shirt, and he recognized the laundry mark as belonging to him and he also identified the Paschal woman as a customer.

In the meantime, while the police were following their leads, which more and more were pointing toward Theodore R. Stovall, Dr. Frances Behrendt had been moved to the Nassau Hospital where her life was saved by Dr. E. T. Montgomery, a friend.

Dr. Montgomery testified (726, *et seq.*) that he has been specializing in general surgery since 1936 and was at the time retired Chief of Surgery at the Nassau Hospital and currently President of the Medical Board.

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[1] Key #358, which led the authorities through Abraham & Straus to Stovall was received into evidence later on in the trial when Detective Stalter testified that the defendant admitted the key was his (820).

[2] At the outset it was touch and go whether Go would be permitted to testify because of the confusion over whether he was to be sworn on a Bible or a chicken's head (652). The matter was resolved to the defendant's satisfaction and no question was raised on this appeal relating to Mr. Go Yee.

Dr. Montgomery found Dr. Behrendt in the emergency room when he arrived at the hospital at about 2:15 in the morning of August 24th. A brief examination revealed that she had been badly cut and was in very serious condition. Dr. Montgomery described the result of his examination thusly (734-737):

"Q. All right, just tell us what you observed. A. Well, she was bleeding from multiple wounds. She was in shock, rapid pulse with a low blood pressure. Her skin was cold and clammy. She was conscious but very visibly frightened and anxious.

Q. Did you treat her? A. I did.

Q. Will you describe, please what you did. A. At the time I saw her in the emergency room the treatment had already started. They were giving her an intravenous solution of dextran, which is a substitute for blood. She was then ordered to have blood transfusions because she had lost blood. We examined her as well as we could in the emergency room, determining that she was losing more blood and ordered her to the operating room as quickly as we could.

Q. And what happened there, Doctor? A. Well, she had lacerations of the body.

Q. Did you then examine her completely? A. Yes.

Q. All right. Would you be good enough then to tell this jury what injuries, if any, you observed. A. She had seven lacerations on her body, one on the right back part of her scalp, several on her shoulder, arm, a long six-or-seven-inch laceration right down to the ribs on the right side under her right shoulder blade. She had another laceration on her left side, which had penetrated the chest cavity. She also had another small laceration up in the abdomen up underneath her ribs just to the left of the center of the body. There were, I think, seven lacerations in all, one of which was bleeding rather profusely, the long one back here (indicating) which had gone right through the muscles.

Q. Did you operate? A. Yes. We cleaned all these wounds up and then proceeded to sew up the lacerations. The one in the chest cavity was rather

small . Dr. Mangiardi, a specialist in thoracic surgery came in to help because of this laceration which had penetrated her left chest cavity and he put a tube into the chest cavities through the ribs in order to release air that had accumulated there. We probed the small laceration of the abdomen."

The defense reserved their right to cross-examine Dr. Montgomery for later in the trial and they exercised their privilege near the end (2613, *et seq.*). At this time, the Doctor corrected his testimony on direct wherein he noted that there were six or seven lacerations on Mrs. Behrendt's body and he changed this to eleven (613-614).

The Doctor's testimony regarding the severity of the wounds suffered by Dr. Behrendt was developed in very great detail on cross-examination (2615-2706) which proves that Mrs. Behrendt was stabbed both from the front and the rear. Further, that at least two of the stab wounds were critical; one in the abdomen and the other below the right shoulder blade, both of which severed arteries causing severe internal bleeding in the case of the stomach wound and external bleeding from the right shoulder injury.

In the Doctor's opinion the injuries could have been caused by a knife.

Coincidentally, with all of this, a young patrolman in the Garden City Police Department was driving his prowl car in the general area and at about 6:50 in the morning at a point one block north of the murder scene, he noted on the shoulder of the road an umbrella. As everyone should know, the Village Fathers in Garden City keep their community spic and span and they don't tolerate umbrellas being left lying around on the side of the road. Accordingly, Patrolman Gebhardt stopped his car, picked up the umbrella and believing that it might have some bearing on the murder, he drove immediately to the Behrendt house where he handed the umbrella to Detective Statler.

One of the more important witnesses summoned by the People was Boyden Stalter (783, *et seq.*) of the Nassau County Police Department. Detective Stalter testified that on the night of August 24th he was attached to the Third Squad and he arrived at the Behrendt home at about 1:15 where he met Lieutenant Hausser of the Garden City Police Department.

Detective Stalter went immediately into the kitchen where he found Dr. Behrendt lying dead on the kitchen floor in a pool of blood with the telephone receiver lying across the upper chest or throat portion of the victim (784-786). Detective Stalter corroborated Lieutenant Hausser and Detective Catapano regarding the kitchen scene (*supra*).

Realizing immediately that he could do nothing for Dr. Paul Behrendt, he went upstairs where he found the victim's wife, Dr. Frances Behrendt, also in a large pool of blood. According to the Detective, Dr. Frances Behrendt was conscious at the time so he attempted to question her. Also and at the same time, he called to Detective Archer, who was still downstairs, who called for additional assistance.

Detective Stalter, during his search of the premises, testified that he observed a knife handle with a broken blade on the table in the dining room and a blade with no handle on the kitchen floor lying in a pool of blood (799).

The next most important fact testified to by Detective Stalter has reference to his confrontation with the defendant at police headquarters late on the afternoon of August 24th when he showed him the umbrella and the keys and the defendant admitted they belonged to him. According to Detective Stalter, the defendant said one of the keys was for his locker at Abraham & Straus and the remaining two were for the front and back doors respectively of his residence at 111-10 145th Street, Jamaica.

Two days later, which would be August 26th, Detective Stalter went to Jamaica where he tried out the keys and he found that they did, in fact, open Stovall's front and back doors, and he also went on into Brooklyn to the Abraham & Straus Department Store where he found that the third key opened Stovall's locker which was #358.

Following Detective Stalter to the stand was Dolores Ramos (1259, *et seq.*), a technical witness, called by the prosecution to identify the white jacket belonging to the deceased (Peo.'s Ex. 30). The Ramos girl testified that she was employed by the Professional Linen Service and Dr. Behrendt was a customer and she wrote Dr. Behrendt's name in People's Exhibit 30 for identification purposes in connection with her work.

Jose Diz (1421, *et seq.*) was a driver for the Professional Linen Service and he testified that he recognized People's Exhibit 30 as one of his products which he delivered to the deceased.

The next most important witness called by the authorities was Captain William Hynes of the Detective Division of the Nassau County Police Department. Captain Hynes has been a member of the force for thirty-five years and on the afternoon of August 24, 1961, at about 4 o'clock, he proceeded to 85 Wellington Road, Hempstead, a village immediately south of Garden City. The premises were occupied by Shirley Stovall Brown, a sister of the defendant. According to Captain Hynes, he was accompanied by Inspector Lada and Lieutenant Tuthill. Hynes went to the rear door and Inspector Lada and Lt. Tuthill to the front door and all three were led into the premises without objection by Shirley Stovall Brown.

Captain Hynes testified that he inquired about her brother "Teddy Bear" and Shirley Stovall Brown told them he was in an upstairs bedroom and she took them all upstairs where she identified her brother (1269-1271) who was immediately placed under arrest by Inspector Lada.

Simultaneous with the arrest of the defendant by Inspector Lada, Captain Hynes seized a white jacket from the clothes closet in the room as well as a pair of men's black trousers that were lying on the floor and also a pork pie hat (1281-1364).

Captain Hynes concluded his testimony with the information that he turned over the white jacket, as well as the hat and trousers to Detective Rieder of the Technical Research Bureau of the Nassau County Police Department (1365-1368).

The People next called Vincent G. Thornton (1427, *et seq.*), Deputy Chief Inspector, who was the commanding officer of the Identification Bureau of the Nassau County Police Department. According to Chief Thornton, he arrived at the death scene in the early morning hours of the 24th and he secured the telephone, the knife handle and blade, as well as the torn shirt and he processed everything except the shirt for fingerprints. Chief Thornton testified the tests were inconclusive so then turned the exhibits over to Detective Rieder.

Following Chief Thornton was Dr. Leslie Lukash (1551, *et seq.*) who is the Chief Medical Examiner for Nassau County. Dr. Lukash declared that he performed the autopsy on the victim and he described his findings thusly (1560-1571):

> "Q. All right. Now, will you be good enough to explain to this jury just what injuries if any, you found upon autopsying this body? A. Yes. We removed Dr. Behrendt to the morgue and made an examination of the body. And as I said there were two major wounds, one over the left upper chest and one over the left lateral chest. In addition there were other superficial linear abrasions not penetrating the skin. The one knife wound was present over the left clavicle and extended downward in a downward, inward and medial direction penetrating the breast plate, crossing over the middle portion of the

chest or the mediasternum, the medical terminology, and lacerated the right lung. This extended for a distance of approximately six inches.

The other major wound was present over the left lateral chest and this was a gaping-type wound measuring approximately 4 by 1½ inches and it penetrated through the fat fracturing the four, five and six ribs, again went in an inward, medial direction and slightly downward, cut the front and back part of the heart, cut the diaphragm, severed the front portion of the stomach and lacerated the uppermost portion of the liver. And this knife wound was again approximately 6 to 6½ inches in depth.

There was a superficial abrasion over the right forearm. This was a linear type abrasion, almost scratch mark in appearance, and there was another very superficial abrasion linear in characteristics over the right chest.

He also had a very superficial wound of the skin over the left abdomen. Dr. Behrendt had these two major knife wounds of the chest. The death resulted from massive hemorrhage, and his left pleura cavity had over a quart and a half of blood and his right pleaura cavity had approximately 400 cc. of blood. These were the major wounds of the deceased.

We did examine all organs. We examined his brain, we sent tissues away for histological studies and we sent tissue away for toxological examination.

The death as I said resulted from hemorrhage from penetrating knife wounds of the chest, heart and lungs, lacerating the stomach and the liver.

Q. Now, these two penetrating knife wounds that you have described, can you state whether either one of them would be a competent and producing cause of death? A. Either one could be a competent producing cause of death, but there is no question that one could cause instantaneous death whereas the other would not.

Q. Now, which of these two knife wounds, Doctor, would cause instantaneous death? A. The knife wound in the left lateral chest that severed the four ribs and cut the anterior and posterior or front and back part of the heart.

Q. These parts were actually cut? A. Severed, yes, just sliced through.

Q. Of the heart itself? A. Of the heart itself.

Q. Now, Doctor, this wound that you have just described now, you followed the path of that particular knife wound, did you? A. Yes, I did.

Mr. Spitzer: Would the court attendant please stand.

Q. Will you describe for this jury the path of this wound on the court attendant? A. The wound was a gaping wound of the skin which measured approximately four by one and a half inches and was located approximately in this area (indicating). The fourth, fifth and sixth ribs were cut through.

Q. Where would that approximately be? A. Right approximately here (indicating). And the path of the knife went in this direction cutting the front and back part of the heart, slicing it through, lacerating the diaphragm that lies just beneath the heart, cutting the stomach which lies in close proximity to the diaphragm and then cutting the upper surface of the liver which again lies contiguous with the diaphragm.

Q. Where approximately would the liver be located? A. The liver would be approximately here, going from here, but it is the left portion of the liver that was lacerated (indicating).

Q. Would that blow require a light or a forceful thrust? A. This would require a considerable force and I would say a considerably strong forceful thrust.

Q. These ribs that were severed, you say the fourth, five and sixth? A. They were cut right through, yes.

Q. Of what material do these ribs consist of? A. Bone.

Q. And the bone was cut right through? A. Cut right through.

Q. Now, with respect to the other penetrating wound, would you be good enough, Doctor, to demonstrate where that was? A. This is the left clavicle and the other wound was present just above the left clavicle and it likewise went in a downward, inward direction and crossed this path from left to right in

a downward direction cutting through the upper part of the breastplate, cutting across the middle portion of the chest and then lacerating the right lung in its most upper portion.

Q. Where, approximately, is the right lung? A. Right approximately here (indicating). And this knife wound went in this direction (indicating). Both wounds went from a left to a right direction in a downward, inward path.

Q. Now, that particular wound that you have just described, would that be produced by a light or a heavy thrust? A. Heavy thrust. This wound or this knife went through the breastplate, the upper portion of the breastplate, which again consists of cartilage and bone and it was an injury of considerable force in order to cut through the bone.

Q. This breastplate that was penetrated consists of bone and cartilage? A. That's correct.

Q. And this knife went right through it? A. It went right through it.

Q. Doctor, I show you the blade on People's Exhibit 23 and the handle with the stub of a blade which is People's Exhibit 22, both for identification, and ask you whether that blade in your opinion would be a competent, producing cause of the injuries that you found? A. Yes, this knife could produce the wounds.

Q. Doctor, I show you this photograph, People's Exhibit 9 in evidence, and ask you whether you recognize the body shown on that picture? A. Yes, I do.

Q. Who is that? A. This is Dr. Behrendt lying on the kitchen floor as I saw it when I arrived at the scene.

Q. Is this the body on which you performed the autopsy? A. That's correct."

Of particular importance to the investigation was the discovery by Dr. Lucash in the Meadowbrook Hospital of a piece of shirt lodged in the armpit of the deceased which was immediately turned over to Inspector Carpenter and Detective Rieder of the Technical Research Bureau, both of whom were present.

Detective Robert B. Rofheart (1702) is a veteran member of the Detective Division of the Nassau County Police Department and a member of the Homicide Squad at the time of the murder. On the date of the trial Detective Rofheart had retired. Detective Rofheart's testimony corroborates that of Detective Catapano, as well as the other police officers, who testified regarding the murder scene.

The main thrust of Detective Rofheart's testimony is to the effect that the defendant admitted the keys found at the scene were his although the defendant steadfastly denied killing the victim (1706-1707). According to Detective Rofheart, Stovall maintained throughout the questioning that he was at his sister's house on Wellington Road in Hempstead, throughout the whole of the evening in question (1707-1708).

Cross-Examination

During the cross-examination Detective Rofheart was questioned about his visit to the Hospital to confront Mrs. Behrendt with the defendant. The nub of the detective's testimony *as brought out on cross-examination* is that Mrs. Behrendt identified the defendant as the man who attacked her husband and herself and whom she met face to face in the kitchen of their home on the fateful night (1803-1807).

The cross-examination of Detective Rofheart is also notable for many other things including the first mention before the trial jury of one of the most important clues which led the police to the defendant and which ultimately singled out Stovall as the killer.

At about 8 o'clock on the morning of August 24th, Detective Rofheart received a telephone call from a young fellow, who wished to remain anonymous, who reported that on the previous night someone, who later turns out to be identified as the defendant, made a telephone call from the Oasis Bar and he had a distinct recollection of the number which he gave to Detective Rofheart (1835-1836).

According to Detective Rofheart, he immediately called the number which turned up Walter Girodeau who admitted that on the previous night, about 10:30, he had received a telephone call from the defendant, Stovall, and he told Detective Rofheart that Stovall lived in Jamaica and he had a sister in Hempstead and he gave the detective both addresses (1840, 1857-1859).

Charlie Rice (1863, *et seq.*) was the owner and landlord of the premises at 111-10 145th Street, Jamaica, which he occupied. Rice testified that he rented the basement to the defendant and that he gave him keys to the front and back doors of the premises.

The next witness was Rosier Brown (1908, *et seq.*), the boy friend of Shirley Stovall, the defendant's sister. According to Brown, on the night of August 23rd, he went to visit his girl friend who lived at 85 Wellington Street, Hempstead, and he arrived at about 7:30 or 8 o'clock.

From the witness' testimony, it would appear that the premises is a rooming house and Miss Stovall occupied at least one of three of the upstairs rooms. According to Brown, the defendant arrived at about 9 o'clock and they drank some Christian Brothers Brandy, after which the defendant left to return to Jamaica on the 11 o'clock train.

Insofar as the defendant was concerned, Brown declared that he was wearing dark pants, a white shirt, hat and shoes and he was carrying an umbrella when he left (1913-1917). Thereafter, Brown decided to stay over so he went to bed and so did Miss Stovall. All of a sudden, at about 1 o'clock, the defendant returned to the one-room residence of his sister, Miss Stovall, without the umbrella or his white shirt.

According to Brown, the defendant was wearing a white coat, which he compared to the white coats worn by doctors, and the defendant's trousers, socks and shoes were all

blood-stained. In fact, Brown testified that the defendant had blood on his face and arm, which the defendant tried to wipe off, and failing this, sister Shirley pitched in to help clean him up.

Of course, the bizarre impression created by "Teddy Bear" literally covered with blood and wearing a white doctor's coat in place of his own dress shirt, undoubtedly aroused the curiosity of both Miss Stovall and Mr. Brown so that they got out of bed to question the defendant and this is what Brown told the jury that Stovall said (1923-1928):

> "Q. Did you have some talk with him? A. Yes. Q. Did you do anything with him? Just explain what went on from that point on. A. Yes. We had asked him what happened, where he had been. So he started telling us about—he says, 'You won't believe this. It was the worstest dream I ever had in my life.'
>
> He started talking about a dream, and so we asked him what happened. And he said he went to the train station and—let's see—he started to the train station, I think, and he saw a man or met a man or something. Anyway, the next thing you know, he was in the train station and he was on a train, and he said it seemed like the train disappeared and then he was in a car or something, he was in a car, and the car stopped, and everything—it was all confusing—couldn't make no sense out of first. So I told him, 'Look, if you lay down maybe tomorrow morning when you wake up you can tell us what happened.'
>
> Q. Yes, what did he tell you? A. The next morning he woke up it was the same thing again. So he said he thought he heard—he was walking down the street or going down the street and he thought he heard a woman holler, a woman screaming, and the way he was talking, you know, you could tell it sounded like it was all confusion. You couldn't make heads or tails of what he was saying at first. And then he said something like he heard a woman screaming and he said he ran in this house and there was a man laying there in a pool of blood. And so we said,

'A man in a pool of blood?' He said, 'Yeah, I never seen so much blood.' And then a lady was screaming and hollering. He said she said something to him and he said he told her, 'Lady, you can't hurt me. I'm here to help you. I'm here to help you. I'm here to help you. The Lord won't let you hurt me.'

Q. The who? A. 'The Lord won't let me hurt you. I'm here to help you.' And that's all he remembered until he was home. That's as much as he said.

Q. Well, did he tell you whether he had gone any place after he left your house and before he went to, as you put it, the train station? A. Yes, he said he stopped by the bar and he had a beer.

Q. Did he tell you where the bar was located? A. No, but I presume it was—

Q. No, never mind what you presume. Did he tell you where it was located? A. No.

Q. Did either you or Shirley in your presence ask him where he had gotten the jacket? A. Yes.

Q. What did he say? A. He doesn't seem to know. He just said—at first he looked down at himself like this (indicating). He said, 'Jacket?' He said, 'Where is my shirt?' Like that, as if he didn't even know he had the jacket.

Q. Did he at any time tell you where he had gotten the jacket or how he got in possession of the jacket? A. No, he just seemed to think—he actually doesn't know how he got the jacket. All I know he looked down and the jacket was on. He had the jacket on."

At the time of the trial, Mr. Brown and Miss Stovall apparently were husband and wife and admittedly, Mr. Brown would very much like everything to come out all right for his new brother-in-law, Theodore Roosevelt Stovall (1970-1971). Nevertheless, Brown testified the defendant was not drunk when he came to the apartment at 9 o'clock (2005-2031) and when defendant left the apartment at 11 o'clock, he was a little high but "he wasn't high like he usually gets high when he drinks whiskey" (2035).

Continuing, the defendant's brother-in-law testified that when the defendant returned for a second time at about 1 o'clock he looked "about the same" (2039).

The Eye Witness

The most important identifying circumstances in the case was probably the testimony of Dr. Frances Behrendt (2045, *et seq.*) who, of course, met the defendant face to face in the kitchen of her home. According to Dr. Behrendt, her residence was closed up for the night (2050-2051) and she went to bed while her husband stayed up to hear the late news. At about 12 o'clock she was awakened by a noise and she spoke to her husband who went downstairs, after which she also went downstairs. Reaching the foot of the stairs, Dr. Behrendt testified that she observed the kitchen was lit up and she also saw the defendant and her husband in the kitchen facing each other.

In a nutshell, Mrs. Behrendt testified that the defendant had a knife and was about to stab her husband who had a telephone in his hand (2057-2058). At this point, Mrs. Behrendt declared that she jumped on the defendant and struggled with him as a result of which she was stabbed in the abdomen and fell to the floor critically wounded (2059). Her next recollected fact is that she saw her husband lying dead on the floor with the telephone in his hand. At this point, the defendant came back to Mrs. Behrendt and began to stab her in the back while she was lying helpless on the floor.

According to Mrs. Behrendt, the defendant also tipped over the refrigerator which fell to the floor narrowly missing her (2063). Mrs. Behrendt declared that she took a good look at the killer in the kitchen, which was well lit up, and heard him talk and she identified the defendant as the man who killed her husband and tried to kill her.

On cross-examination, Dr. Behrendt admitted that she didn't know if the defendant had a hat on or wore gloves, but she believes that he was wearing a light colored shirt (2130-2133). Also, Dr. Behrendt testified that she had scheduled a stomach examination for a patient for the following morning, which would be August 24th and her husband, as was his custom in such case, would not leave his white jacket in their office, which they shared, but he hung in on the chair, in the dining room so that he wouldn't have to disturb the patient during the examination (2134-2136).

The principal technical witness called by the People was Detective Eugene Reider (815, *et seq.*) who testified in effect that he went to the murder scene on the morning in question and he recovered what later proved to be the defendant's shirt from Detective Catapano who found it at the scene and he tested the shirt and discovered that it was covered with human blood—group A (2453-2460).

People's Exhibit 40 was the piece of cloth recovered by the Medical Examiner, Dr. Lucash, during the autopsy from under the armpit of the deceased and with reference to this exhibit, Detective Rieder tested it and concluded that it also contained human blood—group B, and that the blood of the deceased was group B (2466-2467). Detective Rieder also testified that he concluded from a microscopic examination that the piece of cloth discovered in the armpit of the deceased by Dr. Lucash had, in fact, been torn from the shirt found on the floor at the murder scene (2468).

People's Exhibit 21 was the tee shirt or undershirt found at the scene by Chief Thornton and this exhibit was tested by Detective Rieder who found that it contained human blood—group A (2478-2479).

People's Exhibit 31 was the defendant's black trousers seized by Captain Hynes incidental to the arrest of the defendant in his sister's home at 85 Wellington Road,

Hempstead. According to Detective Reider they were covered with blood—group A (2492).

People's Exhibit 30, which would be the Doctor's white coat belonging to the deceased, was checked and found to contain blood stains, but they were insufficient for grouping (2498).

The same conclusion was reached with regard to the defendant's pork pie hat (2505).

The same deduction was drawn from the results of the tests of the defendant's shoes which were found to contain human blood but inadequate for grouping.

People's Exhibits 22 and 23 were the knife handle and blade found on the table and kitchen floor respectively at the murder scene which Rieder determined microscopically went together. The witness also concluded that human blood—Group B was on the blade and human blood was on the handle, but it was insufficient for grouping.

According to Detective Rieder, the blood on the kitchen floor where the broken blade was found was Group B (2555) and the cane found at the murder scene contained human blood—Group B, as well as a piece of screen found on the floor which had been cut and torn away (2579-2595).

The witness also checked the broken panes of glass on the porch where he had concluded they were pushed out from the inside as in the case of someone breaking out, and Detective Rieder concluded the broken panes contained human blood but they were too small to type.

The witness also checked Mrs. Behrendt's bedroom and found it covered with human blood—Group A (2717), as was the hallway leading to the bedroom and also the inside of the bathroom (2726-2733).

Human blood—Group A was also discovered on a man's slipper recovered from the kitchen floor and it was also found on the top of both sides of the overturned refrigera-

tor, as well as on the kitchen cabinets and the chair (2744-2745).

Human blood—Group B on the other hand, was found in the area of the kitchen floor where the deceased was found and also on the cabinets directly at the point on the floor where the deceased was discovered (2748).

Detective Rieder also testified that he was at the autopsy and he took scraping from the fingernails of the deceased which proved to be negative.

According to the Detective, he also tested the clothes, such as they were, that the deceased was wearing and they proved to be stained with human blood—Group B (2783).

The witness also took scrapings from the defendant's fingernails at Police Headquarters, but he found no hairs, fibers or tissue, but all ten fingernails contained blood in quantities insufficient for grouping (2785).

The defendant's clothing at the time of the arrest had no blood stains (2787).

According to Detective Rieder, the deceased's blood was Group B and Mrs. Behrendt is Group A.

Rene Girodias was a neighbor of the victim and he was called to prove that he heard the murder even though he didn't recognize it and he called the police and finally, he testified that he saw someone leaving the area in a white coat.

The Bartender

James Joseph McGuire (3018, *et seq.*), was the bartender at the Oasis Bar and Grill, 433 Clinton Road, Hempstead, and one of the more important witnesses in the case. Mr. McGuire testified in substance that on the evening of August 23, 1961, the defendant first came into the bar for a drink and to make a telephone call. It was the opinion

of Mr. McGuire that the defendant was not drunk but there seemed to be something wrong with Stovall which he equated with drugs.

McGuire's relevant testimony is as follows (3023-3035):

"Q. And what conversation if any did you have with him at that time? A. When he came in he went to the telephone booth and made a telephone call and he came out—when he first came in he said, 'How come nobody talks to me when I ask questions?'

I said, 'They are looking at television. Nobody is bothering with you.'

Q. Said what? A. 'Everybody is looking at television and nobody's bothering you.' He came out of the telephone booth and he said he wanted a cup of coffee. He said, 'I don't want that in a cup.' Then he said, 'Can you get me a cab?'

The Court: He wanted a what?

A. (Continuing) A cab. I called a taxicab. He said, 'I don't want the coffee in a cup. I wanted it in a container, I'm going to take it with me.'

He said, 'Give me my change,' I said, 'You didn't give me any money.' He said, 'I give you money, give me my change.'

I said, 'You had better get your cab and there is a cab now,' and he walked out. And as he walked out I saw this big umbrella. I saw it in the telephone booth and I took it and gave it to him and he took off.

Q. Well, how about the coffee? What if anything did you do about the coffee? A. He took the coffee with him. We had an argument over the price. I mean, he wanted change. He said he gave me money.

Q. Did you give him coffee? A. Yes.

Q. In a container? A. That's right.

Q. And he went out. And what about the umbrella, what did you do about the umbrella? A. I ran to the door and I said, 'Here's your umbrella.' I said, 'Here's your umbrella, Johnny.

He said, 'Don't you call me Johnny. My name is Teddy.'

Q. I can't hear you. A. He said, 'Don't you call me Johnny. My name is Teddy.'

Q. That is this defendant here who was talking? A. That's right.

Q. And what happened after you gave him the umbrella outside? A. He went out and got in the cab.

Q. Did you see him again? A. I saw him about fifteen, twenty minutes later passing the place.

Q. Was he passing on foot or in a cab or what? A. On foot. He was walking.

Q. Now, you say that when he went in that telephone booth you say he made a telephone call; is that what you say? A. That's right.

Q. And could you hear any of the conversation? A. No, I couldn't, but he came out and he had a piece of paper with an address on it and come out and wanted to know how he could get to that address, someplace in Uniondale.

Q. He asked you how he could get to this address in Uniondale? A. That's right.

Q. What did you say? A. I tried to explain to him. Another couple of fellows and I tried to tell him how to get there but he was all jumbled up and he just didn't say any more about it. Then I gave him the umbrella and I saw this piece of paper in the telephone booth with a number on it.

Q. Well, we will get to that in a minute. Now, when you spoke to him about how to get to this address in Uniondale, will you explain to us how you came to call a cab. Did he ask for it or did you suggest it? A. No, he asked me to call a cab for him.

Q. You called the cab? A. Yes.

Q. What cab did you call? A. Larry's Cab in Hempstead.

Q. Larry's Cab in Hempstead? A. That's right.

Q. Now you started telling us that you found a slip of paper in the telephone booth after he left, is that correct? A. That's right.

Q. And did you see what was written on that slip? A. Telephone number.

Q. Do you remember what the telephone number was? A. No, I do not.

Q. What did you do with that slip of paper? A. I put it on the back bar for a while and I finally put it in my pocket and took it home with me.

Q. Were you contacted by the police at any time? A. No, none whatsoever.

Q. Well, I mean did there come a time when you did something with this telephone number? A. Well, who's his name came over that night when I went to work, a detective came over and brought me back to identify him.

Q. Well, I mean, did you keep that telephone number to yourself or did you give it to somebody? A. I gave it to the police. They called me up in the morning, early in the morning, half past 8 in the morning. I gave it over the telephone.

Q. Now after you last saw this defendant you say about 15 minutes after he got into the taxicab did you ever see him again while you were working. A. I saw him about two hours later.

Q. Where did you see him? A. He came back in the place. He came into the cafe.

Q. Did you have any conversation with him at that time? A. Well, he asked me for a drink and I said, 'No good. I'll give you a beer, Teddy, that's all.' So he had a white coat on and he said, 'How do you like this coat?'

I said, 'You look pretty good. Maybe you are going out with your girl friend.'

He said, 'Give me a drink.'

I said, 'I'll give you a beer.'

And he took the beer and he took off, no discussion whatsoever. He just drank the beer and went out.

Q. Now, about this white coat, you told us some conversation you had with him. Was there any further words you had with him as to that white coat? A. By that time I couldn't be sure what he said, whether he either got it off a day man or a dead man. I didn't know what he said. I couldn't be sure what he said.

Q. Either a day man or a dead man? A. That's right, I couldn't distinguish.

Q. So you couldn't know which expression he used. A. No, sir.

Q. And this was a couple of hours or so after you last saw him? A. That's right.

Q. Did you see him again after that? A. No, I never saw him again—yes, I did, when they brought me over to identify him.

Q. And that was when, if you know? A. I think that was the next night when I went to work there was a detective over there.

Q. Now, this telephone that you were talking about, I assume it is a booth, is that it? A. That's right.

Q. How does it operate? A. It's coin-operated.

Q. A coin-operated booth? A. That's right, closed booth.

Q. Is it a kind of a booth where you pick up the telephone, you give the number, or do you have to dial it? A. You have to dial it."

Warren Van Gelder (3097) and John L. Kelly (3108) were customers of the Oasis Bar & Grill and they corroborate so much of Mr. McGuire's testimony as relates to the first visit by Stovall to the Oasis Bar around 10:30.

James B. Edmondston (3134) was the taxicab driver who picked up the defendant at the Oasis Bar pursuant to the call from McGuire and he came to the conclusion very quickly that he might not get paid for the fare so he left the defendant out of his cab a block away.

Kathryn Maus (3165, *et seq.*) is a young girl who lives in the neighborhood of the crime and on the night in question, she was driving home with her friend, Peter Eischman, when she observed a colored man standing in the middle of Clinton Road, Garden City, waving his hands. According to Miss Maus, he was wearing a white coat.

Walter Girodeau (3193, *et seq.*) was a Negro male nurse, 62 years of age, who worked at the Meadowbrook Hospital in the psychiatric ward. On the night in question, which would be August 23, 1961, Mr. Girodeau was

in the vicinity of the railroad station in the Village of Hempstead to meet a friend of his who was in the Army in Jersey and who was on a 48 hour leave. Apparently, the Army buddy did not arrive and Mr. Girodeau met the defendant who he learned was named "Teddy" and in substance Teddy told him that he had only recently come North and he didn't have any friends, that he lived in Jamaica and had a sister living in Hempstead nearby. Accordingly, Mr. Girodeau invited him to his home to have dinner and a few drinks.

After eating and drinking some Bourbon, Girodeau drove Stovall to his sister's home on Wellington Street and returned to his own premises to go to bed. Later that evening, around 10 or 10:30, he received a telephone call from the defendant, and Stovall asked him if he would drive him to Jamaica. Mr. Girodeau said that he had loaned his car to a friend and that he wouldn't be around to accommodate the defendant.

Finally, the following morning, which would be August 24th, he received a telephone call from someone, whom we already know was Detective Rofheart, and he testified that he told Detective Rofheart that at 10:30 the night before, he had been called by Stovall about driving to Jamaica.

Cross-Examination

The cross-examination of Walter Girodeau, as well as the redirect and the recross (3223-3450) was very extensive, the gist of which is that Girodeau was a sex pervert who committed an indecent act with the defendant and may have been the murderer. There apparently was no evidentiary basis to suggest that Girodeau was in any way connected with the murder except for the fact that he was a hospital orderly and did, in fact, own some white coats such as those worn by orderlies and doctors. From

this fact, the inference apparently was to be drawn that he, in some way, was the murderer.

Compared to this offer was the fact that Dr. Behrendt's white coat was found in the defendant's room.

Shirley Stovall Brown (3454, *et seq.*) was the defendant's sister and she testified generally, that on the evening of August 23, 1961, she was entertaining her current husband, Mr. Brown, when her brother, the defendant, arrived to pay a little visit. She first saw him about 6 o'clock that evening when he stopped for five minutes and again at 8 o'clock when he stayed a little longer.

According to the witness, her brother left at about 11 o'clock to go back to his home in Jamaica and she went to bed. At about 12:30 the defendant returned for a third time dressed in a pair of bloody, black pants and a doctor's white jacket.

Mrs. Brown's testimony is not at material variance with that of her husband, Rosier Brown, who together testified that the defendant, when he left, was wearing dark trousers, a T-shirt, a white dress shirt and a pork pie hat, and when he returned he had a T-shirt, no dress shirt, but instead was wearing a white doctor's jacket.

Mrs. Brown described the bloody condition of her brother's clothes and she also questioned him about his appearance and she testified in substance, he said he heard a woman's cry for help, which he identified as his sister, and he ran in this house and found someone lying in a pool of blood and heard a woman cry and that the woman tried to hurt him and all the time he kept saying that he didn't want to hurt anybody and he went on his knees in the blood on the floor to pray. In effect, he concluded by saying that all of this was just like a dream (3471-3483).

The following morning when they got up, the witness questioned her brother once again about his condition and

appearance, and he admitted being in the Oasis Bar, but he couldn't specifically recall the whereabouts of the bloody scene described in his dream. The witness concluded her testimony describing her brother as being in a drunken, dopey condition.

The final witness called on the direct case of the prosecution was Michael Wowk, a stenographer who recorded a Question and Answer statement of the defendant taken at Police Headquarters on the 24th of August at about 9:46 P. M. by Assistant District Attorney William Cahn. The statement was introduced into evidence apparently without objection (3630-3646).

The defendant's Statement, which is reproduced as People's Exhibit 67 (4734-4776), was a completely negative statement. The defendant admitted meeting Girodeau and having a bite to eat with him, but he maintained that he went directly to his sister's home on Wellington Road, Hempstead, where he remained for the entire evening.

The statement represented a general denial, with no admissions against interest of importance. There was no explanation for the bloody condition of his clothes or the contradictory testimony of his sister and brother-in-law in connection with his successive visits to her home on the night in question.

The Defense

The first witness called in behalf of the accused was Melvin P. Gaddy, who lived at 85 Wellington Street, Hempstead, apparently in the same building with the defendant's sister, Shirley. Gaddy first saw the defendant about 4:30 or 5 o'clock on the afternoon of August 23rd, sitting in a car near the witness' home. At about 6:30 or 7 o'clock, the witness noticed that the car had disappeared. Ultimately, the witness went to bed, but was awakened in the middle of the night to answer a knock at the door and when

he did, he found the defendant who was wearing a white doctor's jacket and the defendant had blood on him.

According to Gaddy, he said that Teddy seemed to look strange and his speech was mumbly and he did not seem to know where he was going or what he was doing. In the opinion of Mr. Gaddy, the defendant's actions were those of an irrational person (3738).

On cross-examination Gaddy took the position that he couldn't say that the defendant was drunk or crazy (3750), but just that the defendant did not appear to be himself.

The second witness called by the defense was Deputy Chief Inspector John Lada (3762) who testified generally to the police routine at Headquarters after the defendant had been arrested and which he was being questioned. For the most part the testimony has no relevancy to this appeal particularly because there was no confession.

Chief Lada did testify that in his opinion the defendant did not appear to be dopey or give any indication of any incoherency and that he was absolutely rational (3776).

This concluded the defense to this case.

Rebuttal

The prosecution called Dr. Ernani D'Angelo (3810, *et seq.*), a psychiatrist, in rebuttal and he testified in answer to a hypothetical question (3816, *et seq.*) The Doctor concluded that Stovall knew the nature and quality of his act and knew that it was wrong.

Dr. D'Angelo examined the defendant at Police Headquarters on August 24, 1961 sometimes after the defendant had been arrested and before he was arraigned.

After the direct examination of Dr. D'Angelo was concluded, the defense moved curiously to strike the Doctor's

testimony on the ground that the prosecution had injected on rebuttal wholly irrelevant evidence. Apparently, the defense contended the prosecution had no right to offer affirmative proof as to the defendant's state of mind shortly prior, during and subsequent to the moment of the murder. The Judge overruled the objection (3866-3914).

The cross-examination of Dr. D'Angelo dealt primarily with the fact of a man being in the middle of the road, in the middle of the night, waiving his arms and not walking in a straight line. Of course, this fact has reference to the testimony of young Kathryn Maus (3165, *et seq.*) who had testified that a short distance from the murder scene on the night in question, she saw a colored man with a white coat on, in the middle of the road waving his arms.

An effort was made to change the Doctor's testimony as to whether a defendant, who had committed the crimes charged in the indictment, knew what he was doing if, in fact, he was waving his arms in the middle of the night, in the middle of the road near the murder scene. The Doctor maintained that this fact, in and of itself, did not change his opinion as it was equally consistent with the shock and hysteria which overcomes a person when the full impact or realization of the criminal act drives itself home.

POINT I

Fifth, Sixth and Fourteenth Amendments not violated by show up of defendant at hospital.

It is claimed that when Stovall was taken to the hospital room of Mrs. Behrendt for identification purposes, the circumstances were such as to interfere with his constitutional right to counsel; compel him unconstitutionally to be a witness against himself and generally to deprive him of due process. The District Attorney disputes this.

Chronological Sequence of Events

1. The murder occurred on the night of August 23, 1961.

2. Stovall was arrested at 4 o'clock the afternoon of August 24, 1961.

3. Stovall first appeared for arraignment the following morning, August 25, 1961, where he was advised of his right to counsel and the formal arraignment was adjourned to August 31, 1961 to permit Stovall to retain counsel.

4. Later the same day, August 25, 1961, Stovall was identified in the hospital by Mrs. Behrendt.

5. On August 31, 1961, the Committing Magistrate assigned veteran criminal lawyer, George Mulry, to represent Stovall. Counsel demanded an examination which was set down for September 1, 1961.

6. On August 31, 1961, the Grand Jury of Nassau County indicted Stovall for Murder.

As Regards the Show Up

In his opening the District Attorney *without objection* told the jury that Mrs. Behrendt had identified Stovall while still in the hospital (237-238). Also, in his opening the District Attorney cautioned the jury that Mrs. Behrendt hadn't seen the accused since, so he didn't know whether she would be able to identify him at the trial (*supra*).

The second mention of the fact came on the *cross-examination* of Detective Stalter by defense counsel. It is Detective Stalter's testimony, as we read it that he was handcuffed to Stovall when they entered Mrs. Behrendt's room at the hospital; that Chief Pinnell, Chief Farrell, Assistant District Attorney Cahn and Detective Rofheart were present, but he does not seem to have testified specifically that Mrs. Behrendt did or did not identify Stovall (1153-1155).

The third mention of the point occurred when Detective Rofheart was *cross-examined* by counsel for the defense, at which time Detective Rofheart testified unequivocally that Mrs. Behrendt identified Stovall as the man who " 'struck my husband down and cut me' " (1803).

Naturally, when Mrs. Behrendt was summoned, she testified on direct examination (2075-2076) *without objection* to the hospital room identification.[1]

Also, on *cross-examination* Mrs. Behrendt was interrogated extensively (2259-2280) on the prior identification and the circumstances surrounding it. As a matter of fact, counsel for the accused made a successful point because Stovall was the only colored man in the hospital room.

The claim is the trial in this regard fell below the minimum standards of the Fifth, Sixth and Fourteenth Amendments for Stovall was compelled, without counsel, to be a witness against himself by virtue of the "showup" at the hospital after the criminal proceeding had been commenced by the first arraignment on August 25, 1961. Not so (cf. *Schmerber* v. *California* [1966] 384 U.S. 757, pp. 763-764; *Miranda* v. *Arizona* [1966] 384 U.S. 436; *Vignera* v. *New York* [1966] 384 U.S. 436; *California* v. *Stewart* [1966] 384 U.S. 436; *Holt* v. *United States* [1910] 218 U.S. 245, p. 252; *Kennedy* v. *United States* [1965 D.C.] 353 F. 2d 462, pp. 464-467; *Caldwell* v. *United States* [1964 8th Cir.] 338 F. 2d 385; *People* v. *Gilbert* [1966] 63 Cal. 2d 290, 47 Cal. Rptr. 909, 408 P. 2d 365, No. 254, Oct. Term 1966, Supreme Court of the United States, *People* v. *Clark* [1963] 28 Ill., 2d 423, 192 N.E. 2d 851; *Redmen* v. *Commonwealth* [Ky. 1959] 321 S.W. 2d 397; *Commonwealth* v. *Downer* [1946] 159 Pa. Super. 626, 49 A. 2d 516; *State* v. *Hill* [1964] 193 Kan. 512, 394 P. 2d 106).

---

[1] Mrs. Behrendt was not questioned on direct examination about the voice identification of Stovall. There was no reliance on a similarity so Stovall on the direct evidence at the trial was not convicted because he spoke at the show up at the hospital.

The Privilege Against Self-Incrimination

The privilege circumscribed by the Fifth Amendment has been so recently reconsidered by the Court in *Schmerber*, if not *Miranda*, *Vignera* and *Stewart*, that there can no longer be any doubt that the guarantee has reference to oral testimony as distinguished from pre-trial identification procedures, such as (*Schmerber* v. *California*, *supra*, pp. 763-764):

> "fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."

It would seem therefore, that it cannot be seriously suggested that the victim of an attempt to murder on death's own threshold may not look at her assailant without interfering with the Fifth Amendment rights of the suspect.

This is so for (*supra*, pp. 763-764):

> "The distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' [identification] does not violate [the Fifth Amendment]."

The Right to Counsel

Reasoning that Armando Schmerber had no Fifth Amendment privilege such as to preclude the taking of his blood, this Court concluded Schmerber had no greater right because counsel advised against it.

The court's finding with reference to Schmerber's Sixth Amendment right to counsel would seem to answer completely Stovall's primary thrust for reversal (Petitioner's Brief, pp. 12-15), that his right to counsel was interfered with because Dr. Frances Behrendt looked at petitioner in the hospital room after the commencement of the criminal prosecution.

For the reason that petitioner had no Fifth Amendment right not to exhibit himself for identification purposes, he has no greater right because he was without the benefit of counsel at the moment of truth.

Indeed, like Schmerber, had counsel advised against the "showup", no constitutional wrong would have been done Stovall if the command was ignored by the police, and the petitioner taken before his victim in the hospital.

Method of Identification Goes to Weight Not Competency

To the respondent, the principal thrust in petitioner's brief relates to the probative value and not constitutionality of the evidence regarding a prior identification. In this connection, it is settled everywhere that the *method* of identification goes to the weight, not competency (*People* v. *Crenshaw* [1962] 15 Ill. 2d 458, 155 N.E. 2d 597, cert. den. 359 U.S. 997; *Kennedy* v. *United States* [1965 D.C.] 353 F. 2d 462; Anno: Extrajudicial Identification 71 A.L.R. 2d 449).

The general rule was succinctly stated by the Illinois Supreme Court in the *Crenshaw* case as follows (p. 604):

> "There is no requirement in the law that an accused person must be placed among a group of persons for the purpose of testing the ability of a witness to identify him as the guilty person, * * * and where an accused is not selected from a group, such fact does not render evidence of identification incompetent but only affects its weight. * * * Similarly, where claim is made that identification was induced by police suggestion that the guilty party is in custody, * * * such procedure does not completely destroy the evidence of identification, but affects only its weight and credibility."

Just last year, Judge Burger in the United States Court of Appeals for the District of Columbia in the case of William W. Kennedy considered whether or not the accused had a right to be viewed in a line-up as distinguished from

a showup. From the published report, it would appear that Kennedy and another were arrested after robbing two women victims in their apartment. The screams of the ladies attracted the attention of two passers-by who captured Kennedy and had Kennedy in custody when the police arrived pursuant to a radio call. Kennedy was promptly marched into the apartment by the police where the victims were found handcuffed to a stair rail. Upon seeing Kennedy, the identification was made then and there.

In the Court of Appeals, Kennedy contended the showup was constitutionally bad. In rejecting the argument, Judge Burger concluded (*supra*, p. 466):

> "An accused has no right to be viewed in a line-up rather than singly."

Going on, Judge Burger recognized that "a lawyer on the scene might have *asked* the police to assemble a line-up before arranging a confrontation" (p. 466) but the police were under no constitutional obligation to comply. This is so because "At that stage police, not suspects, must be in control" (p. 466).

In the current case, it was the police and the District Attorney, not Stovall, who were still in control because of the duty still owed petitioner. The record evidence is Stovall was arrested at 4 o'clock the afternoon of August 24, 1961, and arraigned the following morning August 25, 1961.

Time

Undoubtedly, the police authorities would have preferred to confront Stovall with Dr. Behrendt earlier (cf. *Miranda* v. *Arizona* [1966] 384 U.S. 436; *Vignera* v. *New York* [1966] 384 U.S. 436; *California* v. *Stewart* [1966] 384 U.S. 436), and most assuredly prior to arraignment (*People* v. *Meyer* [1962] 11 N.Y. 2d 162), but the physical condition of Dr. Behrendt made this impossible.

It is undenied that Dr. Behrendt had undergone a traumatic experience what with observing the murder of her husband to say nothing of the eleven stab wounds inflicted upon her body by petitioner (613-614).

We have treated the nature of the wounds elsewhere in our brief in greater detail. Nevertheless, it needs repeating that Dr. Behrendt was stabbed repeatedly both front and back and that two of the lacerations were critical: one in the abdomen, and the other below the right shoulder blade, because of the numerous arteries severed and the extensive bleeding. The operative procedures were described in great detail by Dr. Montgomery (726, *et seq.*). The unescapable conclusion is:

1. Dr. Behrendt was physically incapable to view petitioner prior to the arraignment.

2. Dr. Behrendt throughout was in a critical condition.

3. Dr. Behrendt was the single witness who could exonerate Stovall.

To have failed or refused to bring Stovall to Dr. Behrendt's bedside because of the arraignment would have constituted a callous disregard of the rights of the accused by the authorities that might have reached frightening proportions had Dr. Behrendt, like her husband, succumbed to the wounds inflicted upon her by the petitioner if Stovall was innocent.

The law enforcement authorities in Nassau County are alert to the fact that the very heart stone of every criminal case is identification. Sound, thorough police procedures require that all identifying witnesses see the accused as quickly as possible to the end that justice will triumph.

Modern day transportation in this great country being what it is, it all too often is impossible to bring about the meeting prior to the arraignment. The first confrontation regularly occurs, we repeat, regularly takes place after the

criminal proceedings have commenced against the accused. For example:

1. At the actual arraignment before the Magistrate and while the defendant is still in the court room.

2. After the arraignment but before the defendant has left the scene of the court house freed on bail.

3. At the felony examination before the Magistrate 48 hours later.

4. When the case goes to the Grand Jury if defendant requests permission to appear and testify.

5. At the arraignment on the indictment.

6. After any arraignment if defendant is bailed or released in his own recognizance at one of his haunts.

7. In jail any time after any arraignment where defendant has not been bailed or is held on other charges.

But for whatever the reason, it surely cannot be that prejudice results if a victim views her attacker *before* trial whether it is *prior* or *subsequent* to the commencement of the court proceedings when we all agree the victim may view the accused much later, as during the trial, with no constitutional infringement (*People* v. *Winship* [1955] 309 N.Y. 311, pp. 313-314; *People* v. *Gardner* [1894] 144 N.Y. 119, pp. 127-129; *Swingle* v. *United States* [1954 10th Cir.] 151 F. 2d 512; *Panzich* v. *United States* [1933 9th Cir.] 65 F. 2d 550).

Unquestionably, the authorities, where possible, owe it to every accused to see to it that the confrontation takes place, not only as quickly as possible, but under circumstances that will be fair, else the result is of little probative value.

Maybe the opinion of Dr. Behrendt would be entitled to greater weight had the confrontation taken place at

police headquarters (*cf. Miranda* v. *Arizona* [1966] 384 U.S. 436) and the identification made from a line-up of five identical individuals. But it is our understanding that it has never been held that the time or circumstances of the identification will give rise to a Fourteenth Amendment question and petitioner cites no authority for this extraordinary claim.

The hospital show-up did not "offend a sense of justice" (p. 173), or "shock the conscience" (p. 172) or even come "close to the rack and the screw" (*Rochin* v. *California* [1952], 342 U.S. 165, p. 172) such as a stomach pump to induce vomiting to recover two capsules of morphine (*supra*).

The nature or composition of the line-up was but a fact to be considered with all others by the jury when weighing the testimony of Dr. Behrendt.

Finally, the fact looms large that petitioner was not convicted because of the hospital room identification, but the identification that occurred in the court room during the trial. As a matter of fact, Dr. Behrendt's court room identification would have carried greater weight had she never seen the petitioner in the hospital. It is plain to see that the circumstances of the hospital room episode did not strengthen Dr. Behrendt's identification, but in the eyes of the jury weakened it immeasurably.

While not necessarily controlling, we cannot help but note that Ernesto Miranda, Michael Vignera and Roy Allen Stewart all were looked at for identification purposes by the victim, or a crime witness as best can be determined from the published report of the Court. Miranda was identified in police headquarters, as was Vignera, both before the Court proceedings had commenced, whereas Stewart apparently was identified sometime after he had been placed in a cell and presumably after the criminal Court proceedings had commenced.

In ordering a new trial, this Court did not direct or even suggest the identification procedures ran afoul of the defendant's Fifth, Sixth or Fourteenth Amendment rights.

Specifically, in the case of Vignera, there was a "show-up" in the stationhouse in Brooklyn where the victims of the robbery identified Vignera. This Court did not hold, or even intimate that upon a retrial the victims should not be permitted to testify to the stationhouse identification of Vignera.

In conclusion, the petitioner suggests that if the Court is of a mind to reverse, then a voir dire should be conducted to determine the impact of the hospital room showup on the overall competency of Dr. Behrendt to identify the petitioner as the individual that she observed slay her husband. Of course, this is precisely what a trial is for and it represents the issue that should be resolved historically and traditionally by a jury.

In *Wade* v. *United States* [1966 5th Cir.], 358 F. 2d 557 cert. granted, October Term 1966 No. 334, the Court concluded that a line-up in the absence of counsel was prejudicial and upon a retrial the identifying witness not only would be incompetent to testify to the line-up, but was disqualified from giving any identification testimony regardless of the source or the circumstances of identification.

We believe the rule in such case is to the contrary (cf. *United States* v. *Blue* [1965], 384 U.S. 251).

Ben Blue was indicted for a criminal violation of the Income Tax Laws. His motion to dismiss the indictment was granted because in related proceeding Blue was compelled to incriminate himself. In reinstating the indictment, this Court concluded that exclusionary rules of the Court dealing with the Fourth Amendment (*Mapp* v. *Ohio* [1961], 367 U.S. 643), Fifth Amendment (*United States* v. *Blue, supra*), and Fourteenth Amendment (*Rogers* v. *Richmond* [1960], 365 U.S. 534) did not warrant a barring of the

prosecution. In this regard, the Court in *Blue* declared (p. 255):

> "Our numerous precedents ordering the exclusion of such illegally obtained evidence assumes implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

No more is required here, in the event of a retrial, than to omit Dr. Behrendt's testimony with the reference to the hospital room confrontation.

CONCLUSION

The order should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 254

THEODORE STOVALL,

Petitioner,

against

HON. WILFRED DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

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HON. WILFRED DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

Interest of the *Amicus*

The granting of certiorari in this case brings before the Court important questions involving the relationship of the State to a criminal accused, the scope of the constitutional guarantees of the Fifth, Sixth and Fourteenth Amendments, and the availability of federal habeas corpus as a forum for the establishment of a new exclusionary rule.

We agree with and endorse fully the positions taken by counsel for the respondent and for the State District Attorneys' Association as *amicus curiae*—positions which are consistent with established concepts of the privilege

against self-incrimination, the right to the assistance of counsel, and due process of law—in opposition to the arguments advanced here by the petitioner. Particularly in view of the fact that the Court now has before it two other cases involving similar facts and issues,[1] however, we recognize the possibility that the Court may consider the establishment of an exclusionary rule limiting the admissibility of identification evidence obtained in the absence of counsel. Accordingly, we have focused our attention in this brief upon the somewhat limited questions of whether any such exclusionary rule should be applied retroactively.

The interest of the Attorney General in this question—one which is posed clearly by the facts of this case as well as by other cases in which habeas corpus petitioners rely on recent decisions of this Court—is substantial. Because the present case involves a New York State prisoner, the Attorney General naturally has a strong interest in its outcome.[2] In addition, however, the Attorney General, as chief legal officer of the State and as counsel for State

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[1] *Gilbert* v. *California*, No. 223; *United States* v. *Wade*, No. 334. Although in some respects similar, the circumstances surrounding the identifications and the subsequent use of the identification testimony in *Gilbert* and *Wade* are by no means identical to those in the present case. In addition, in *Gilbert* there are several issues wholly unrelated to the use of the identification testimony. *Wade* involves a federal prosecution; thus constitutional issues need not be reached in that case. Both *Gilbert* and *Wade*—unlike the present case—reach the Court while in the direct appellate process.

[2] The Attorney General normally appears as counsel for respondent in federal habeas corpus proceedings involving State prisoners (e.g., *Angelet* v. *Fay*, 381 U. S. 643). Pursuant to long-standing practice in cases where the death sentence has been imposed, however, the District Attorney in the county of conviction (Nassau County) has represented the Warden throughout the federal proceedings in the instant case. It should be noted, however, that pursuant to a proclamation made by the Governor at the time he approved a bill abolishing capital punishment in all cases except those involving the killing of a peace officer acting in the line of duty or involving murder by a person already under a sentence of life imprisonment (L. 1965, ch. 320), petitioner's death sentence will be commuted regardless of the outcome of these proceedings.

correction officials, is concerned over the possible effects of an adverse decision upon the convictions of other State prisoners. The problem of retroactive application of new constitutional rules is an acute one, particularly in the present era of rapidly changing concepts of due process in the criminal law field.

The New York Attorney General has appeared either as counsel for a party or as *amicus* in the recent cases dealing with the applicability to earlier convictions of the newly developed exclusionary rules barring admission of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618; *Angelet* v. *Fay*, 381 U. S. 643) and governing the admissibility of in-custody statements of an accused (*Johnson* v. *New Jersey*, 384 U. S. 718). Consistent with our position in those cases, we urge in this brief that, whatever may be the Court's views regarding the admissibility of eyewitness identification testimony or testimony as to post-arraignment or post-indictment identifications (or other investigations involving contact between the police and an accused) in the absence of counsel, any newly established rule excluding such testimony should not be applied retroactively.

Summary of Argument

The petitioner in the present case concentrates exclusively on the pre-trial hospital identification made after arraignment and in the absence of counsel. In doing so, he wholly ignores the fairness of his 1962 trial and the reliability of the adjudication of his guilt. There can be no doubt, however, but that the use at trial of the identification testimony violated no previously declared constitutional rights. Because the case arises on habeas corpus and involves a conviction which became final prior to the establishment of any of the recent decisions involving the right to counsel at extra-judicial proceedings, a retroactivity issue is necessarily present.

We submit that the same considerations which militated against retroactive application of newly established rules limiting the admissibility of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618), prohibiting adverse comment by a prosecutor or trial judge upon a defendant's failure to testify at a criminal trial (*Tehan* v. *Shott*, 382 U. S. 406) and governing the admissibility of an accused's in-custody statement (*Johnson* v. *New Jersey*, 384 U. S. 719), weigh at least as heavily against retroactive application of any new exclusionary rule such as petitioner now seeks.

The purposes of any such rule would be essentially the same as the purposes of the rules developed in *Mapp* v. *Ohio*, 367 U. S. 643, *Griffin* v. *California*, 380 U. S. 609 and *Miranda* v. *Arizona*, 384 U. S. 436, in that they would be concerned primarily with the integrity of the judicial system, in a broad sense, rather than with the fairness and reliability of the trial process. An exclusionary rule may be an effective deterrent to police conduct which tends to adversely affect the administration of justice, but deterrence is a peculiarly prospective purpose. Past conduct cannot be undone. Here, moreover, the challenged conduct cannot be said to have been wrongful either at the time of the identification or at the time of the trial. Compare *Linkletter* v. *Walker*, *supra*.

Retroactive application of a new rule based on any of petitioner's claims would result in the reopening of a number of convictions obtained in reliance upon the law as it previously existed. There can be no doubt but that analogous prior decisions of this Court and the lower federal courts clearly supported the use of identification evidence such as that in the present case. See, *e.g.*, *Holt* v. *United States*, 218 U. S. 245; *Breithaupt* v. *Abram*, 352 U. S. 432. Similarly, there can be no doubt but that—at least prior to the decisions in *Massiah* v. *United States*, 377 U. S. 201 and *Escobedo* v. *Illinois*, 378 U. S. 478—evidence obtained at extra-judicial proceedings involving con-

tact with an accused was not rendered inadmissible simply because of the absence of counsel for the accused. See, *e.g.*, *Spano* v. *New York*, 360 U. S. 315.

The reopening of past convictions—with inevitably great advantages to the accused both on the collateral attack and upon retrial—would be but one of many adverse effects upon the administration of justice which would flow from retroactive application of such a rule. Because the case is so closely analogous to the *Linkletter*, *Tehan* and *Johnson* cases, retroactive application would throw the law with respect to post-conviction remedies into great confusion. One result would be a wholly unwarranted drain on legal resources at a time when these resources can be far more beneficially allocated to present responsibilities and to the pursuit of constructive developments in other areas of the criminal law. Another result would be to impose serious restraints on the progessive development of new rules by the state courts. Surely one important reason why some state courts have felt free to establish new exclusionary rules—rules which in many cases have subsequently been adopted by this Court—has been their reasonable expectation that the new rules would not affect past cases in which convictions have become final.

ARGUMENT

Petitioner's claims do not warrant relief on habeas corpus.

The petitioner in the present case concentrates his attention exclusively on what he regards as the evils of the pre-trial hospital identification. His brief completely ignores the fairness of the adjudicatory process by which he was convicted and the reliability of that judgment of conviction.

Clearly, however, the use at trial of the identification testimony violated no previously declared constitutional rights. Neither the exhibition of the body of an accused

for identification nor the manner in which an identification was made—e.g., at a "line-up", or a "show-up", or in the absence of counsel—has ever been ground for exclusion of the evidence; the circumstances under which the identification were made have, historically, gone solely to the weight to be accorded the testimony by the trier of fact. See, e.g., *Holt* v. *United States*, 218 U. S. 245, 253-54; *Copeland* v. *United States*, 343 F. 2d 287 (D. C. Cir. 1965); *Kennedy* v. *United States*, 353 F. 2d 462, 466-67 (D. C. Cir. 1966); *Caldwell* v. *United States*, 338 F. 2d 385 (8th Cir. 1964). Similarly, evidence obtained as a result of contact between law enforcement officials and an accused at which no counsel for the accused was present was not excludable on constitutional grounds at the time of petitioner's trial simply because the evidence may have been obtained after arraignment or indictment. See *Spano* v. *New York*, 360 U. S. 315. *Cf. Gilbert* v. *United States*, 366 F. 2d 923, 937-946 (9th Cir. 1966), and authorities cited therein.

In view of this state of the law, it can hardly be said that petitioner had any constitutional right, at the time of the trial, to have the identification testimony excluded from the jury's consideration. Indeed, even now it is highly questionable whether such testimony could or should be excluded on constitutional grounds. The facts of this case are quite distinguishable from those in the three recent cases of this Court upon which petitioner relies (Br., pp. 12-14)[1] and the Court below—without considering the retro-

[1] *Hamilton* v. *Alabama*, 368 U. S. 52, and *White* v. *Maryland*, 373 U. S. 59, both involved the absence of counsel at judicial proceedings. In *Hamilton*, a capital case, the defendant had had no counsel at the arraignment, a critical stage in Alabama because available defenses could be lost if not then asserted. In *White*, also a capital case, the defendant had had no counsel at a preliminary hearing at which he pleaded guilty; the plea was later introduced in evidence at trial. The present case can no longer be considered a capital case (see *supra*, p. 2, n. 2), and the hospital identification was not a part of any formal judicial proceedings, did not result in the loss of any defenses, and did not involve any self-incriminatory declarations.

(Footnote continued on following page)

activity aspects of the problem—held that such testimony was permissible. With but one exception, other courts which have considered similar claims have rejected them.[2]

We are in complete agreement with counsel for the respondent and the State District Attorneys' Association that the *en banc* Court below was correct in its rejection of petitioner's proposed exclusionary rule as uncalled for under any of the Constitutional provisions upon which he relies.

(Footnote continued from preceding page)

Massiah v. *United States*, 377 U. S. 201, was the first case to extend the right to counsel to non-judicial proceedings and involved a federal prosecution; there the defendant had been arraigned on an indictment, a lawyer-client relationship existed and was known to the government, and surreptitious means were employed by the government to circumvent this relationship and obtain incriminating statements from the defendant, who objected at trial to the introduction of the incriminatory statements. The instant case, by contrast, involves a state prosecution; here there was no existing lawyer-client relationship which was circumvented, no incriminating statements were used against the defendant, and—far from objecting at trial—the defense itself sought to use the identification testimony to its own advantage.

In addition, both *Hamilton* and *Massiah* reached the Court on direct appeal; *White* apparently would have been considered on direct appeal had the State not urged that the claim would be considered on coram nobis. The instant case, by contrast, arises on federal habeas corpus and without any explanation as to why exclusion of the now challenged evidence was not sought at trial.

[2] The exception is the United States Court of Appeals for the Fifth Circuit, which has held in a 2-1 decision that admission of testimony as to an identification made after indictment and in the absence of counsel was reversible error. *Wade* v. *United States*, 338 F. 2d 557; *cert. granted* —— U. S. ——, 17 L. Ed. 2d 53 (No. 334, Oct. Term 1966). The *Wade* case is clearly distinguishable from the present case—it arises on direct appeal and involves a federal prosecution, the conduct of federal agents, the disregard of an existing lawyer-client relationship, and the obtaining of voice communication prior to the identification. For federal and state decisions rejecting similar claims of inadmissibility of identification testimony, see *infra* page 12, n. 1; see also authorities collected in the opinion of Judge MOORE in the *en banc* Court below (R. 37, 41-46).

Because this case arises on habeas corpus, however, a retroactivity issue is necessarily present. It is with that issue that we are primarily concerned in this brief. Such an approach, we suggest, may make it unnecessary to consider the merits of petitioner's claim that the now-challenged identification testimony should have been excluded at trial. We consider the same criteria employed by the Court in other recent opinions dealing with the retroactivity of newly established exclusionary rules: the purposes of the rule; the previous state of the law; and the effect upon the administration of justice of a retroactive application of the new rule. *Linkletter* v. *Walker*, 381 U. S. 618, 629, 636; *Tehan* v. *Shott*, 382 U. S. 406, 410, 419; *Johnson* v. *New Jersey*, 384 U. S. 719, 727. We submit that a balancing of the relevant considerations makes it amply clear that any new rule which might be developed to make excludable testimony such as that now challenged in this case would have no better claim to retroactive application that did the rules at issue in the *Linkletter*, *Tehan* and *Johnson* cases, *supra*.

Purposes.

Assuming that there may be some validity to petitioner's contention that the identification procedure in the present case violated his privilege against self-incrimination, one obvious purpose of a new rule would be to protect that privilege. Clearly, however, the essential policies of this privilege—relating primarily to preservation of the integrity of a judicial system in which the guilty are not to be convicted unless the prosecution "shoulder the entire load" (*Tehan* v. *Shott*, *supra*, at 415)—would not be furthered by retroactive application of a new rule relating to the use of identification testimony. *Id.*, and see *Johnson* v. *New Jersey*, *supra*. As the Court recognized in *Schmerber* v. *California*, 384 U. S. 757, the core of the privilege is in the protection against the use of evidence of a testimonial or communicative nature which has been compelled from an accused. *Id.* at 761. When such evi-

dence has been compelled and used to obtain a conviction, the conviction is already subject to collateral attack; retroactive application of a new exclusionary rule is not necessary. *Johnson* v. *New Jersey, supra* at 730. There is no evidence whatsoever that the conviction in the present case is based upon any such communication.[1]

Other possible purposes of a new rule requiring the presence of counsel at an identification might be to increase the possibility that an accused would be exhibited "fairly" to an eyewitness and to provide an additional witness to the proceedings. The presence of counsel at interrogation provides a similar check with respect to the reliability of an accused's statements; however, this marginal function of the new *Miranda* rules (see *Miranda* v. *Arizona*, 384 U. S. 436 at 466) has been held not to require retroactive application of those rules (*Johnson* v. *New Jersey, supra*). The possibility that "better" evidence might have been obtained and introduced is present in any criminal case; in terms of past cases, the effect of a different procedure can only be speculative. It has always been open to defense counsel to explore the circumstances of an identification through cross-examination of the eyewitness and the other persons present at the identification. *Cf. Gilbert* v. *United States*, 366 F. 2d 923, 946 (9th Cir. 1966). The defense counsel in the present case went into the circumstances of the hospital identification quite thoroughly on cross-examination, and there is no suggestion that they were not before the jury.

Particularly if the right to the assistance of counsel is to be regarded as "absolute" in non-judicial proceedings as well as judicial proceedings once a prosecution has been commenced by arraignment or indictment (*cf. Massiah* v. *United States*, 377 U. S. 201), it may be argued that no contact whatsoever should be permitted between law en-

[1] Petitioner was identified as "the man" by Mrs. Behrendt, the wife of the murder victim, before he said anything aloud (1803-05). Voice identification was subsequently requested, and Stovall apparently did say a few words (*id.*), but the words were not used or referred to at the trial.

forcement officials and an accused who does not have access to counsel at the time of such contact. An exclusionary rule would, of course, be an effective deterrent to such contact. Retroactive application of such a rule would be uncalled for, however. Clearly, the deterrent purpose could not be furthered by such application; to the extent that an exclusionary rule serves as an effective deterrent to a particular kind of conduct in the criminal law field it is because law enforcement officials may, after the establishment of such a rule, be expected to act appropriately with knowledge of its sanction. Past conduct cannot be deterred. *Cf. Linkletter* v. *Walker, supra,* at 636-637. Moreover, the image of the judicial system as a steady and reliable institution would be quite adversely affected by retroactive application of such a rule. Retroactive application of a rule based on the desirability of providing counsel at extra-judicial proceedings would be completely contrary to the decision and rationale in *Johnson* v. *New Jersey, supra,* and would be inconsistent with the pre-*Massiah* decisions of the Court which had declined to establish any kind of exclusionary rule affecting post-arraignment or post-indictment contract between law enforcement officials and an accused (e.g., *Spano* v. *New York, supra*).[1]

Although petitioner relies heavily on the Sixth Amendment, the exclusionary rule he seeks is by no means analogous to the one Sixth Amendment decision, *Gideon* v. *Wainwright,* 372 U. S. 335, which has received general retroactive application. In *Gideon,* the Court "recognized a fundamental fact that a layman, no matter how intelligent, could not possibly further his claims of innocence and vio-

[1] At least two Circuit Courts have held explicitly that the absence of counsel at the time an accused made incriminating post-indictment statements to the police (which were subsequently introduced against him at trial) would not be grounds for habeas corpus relief. *Lyles* v. *Beto,* 363 F. 2d 503 (5th Cir., dec'd July 13, 1966, following remand from this Court [379 U. S. 719] for reconsideration in light of *Massiah*); *United States ex rel. Romano* v. *Fay,* 360 F. 2d 389 (2d Cir. 1966), pet. for cert. pending, No. 644 Misc., Oct. Term 1966.

lation of previously declared rights adequately." *Linkletter* v. *Walker*, *supra* at 639 n. 20. The absence of a lawyer at trial fatally infected the whole trial process, and a judgment after such a trial lacked reliability. *Id.*, and see *Tehan* v. *Shott*, *supra*, at 416; *Gideon* v. *Wainwright*, *supra*, at 344-45; *Powell* v. *Alabama*, 287 U. S. 45, 68-69. In the present case, by contrast to *Powell* and *Gideon*, the petitioner had counsel at the trial and there has been no issue raised as to the adequacy of counsel, or as to counsel's opportunity to prepare for trial, or as to the reliability of the conviction.[1]

Reliance

The Court has never previously struck down the use of identification testimony such as that introduced in the present case. Indeed, analogous prior decisions of the Court clearly support the use of such evidence. In *Holt* v. *United States*, 218 U. S. 245, the petitioner claimed that he had been forced to try on a blouse and that trial testimony of a witness to the effect that the blouse fit him should have been excluded as a violation of his Fifth Amendment rights; the Court rejected the claim in a unanimous opinion by Mr. Justice HOLMES. *Id.* at 252-253. In *Breithaupt* v. *Abram*, 352 U. S. 432, the petitioner relied on the Fifth and Fourteenth Amendments in claiming that testimony as to the alcohol content of blood which had been withdrawn from his body while he was unconscious should have been excluded at trial; this claim, too, was rejected. *Id.* at 435-440. *Breithaupt* was followed last term

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[1] Indeed, even the original panel of the Circuit Court, which sustained petitioner's Sixth Amendment claim, stated that there was "massive evidence showing Stovall to have been the killer of Dr. Behrendt" and that "the episode of the hospital identification has been overblown to a significance all out of proportion to anything it could have had at trial" (R. 32). The panel indicated that it would have accepted a "harmless error" argument if the punishment for petitioner's conviction had not been death (*id.*).

in a case in which a blood sample had been withdrawn over the accused's clear objections. *Schmerber* v. *California, supra.* The state courts and lower federal courts have also consistently upheld the use of testimony as to identifications such as that in the present case.[1]

As far as past cases are concerned, the legitimate reliance on the prior state of the law regarding identification testimony is by no means undercut by the recent decisions of the Court limiting the use of statements obtained in the absence of counsel after an indictment (*Massiah* v. *United States,* 377 U. S. 201; *McLeod* v. *Ohio,* 381 U. S. 356) or after an accusatorial stage has been reached prior to the commencement of a formal prosecution (*Escobedo* v. *Illinois,* 378 U. S. 478; *Miranda* v. *Arizona, supra*). These recent cases—all decided after petitioner's trial and after affirmance of the conviction by the New York Court

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[1] See, *e.g.,* in addition to the opinions below, *People* v. *Gilbert,* 47 Cal. Reptr. 909, 408 P. 2d 365 (1965), *cert. granted sub nom. Gilbert* v. *California,* 384 U. S. 985 (No. 223, Oct. Term 1966) (testimony of eyewitness as to identification of accused at post-indictment lineup held admissible at murder trial despite absence of already-appointed counsel at time of lineup); *Gilbert* v. *United States,* 366 F. 2d 923 (1966) (same defendant, same holding in an extensive opinion on appeal from federal bank robbery conviction); *Kennedy* v. *United States,* 353 F. 2d 462 (D. C. Cir., 1965) (testimony of robbery victims as to post-arrest identification made immediately after apprehension near scene but in absence of counsel held admissible); *Copeland* v. *United States,* 343 F. 2d 287 (D. C. Cir., 1964) (accused taken to office where robbery had taken place and there identified by victim, then taken to police station and identified by victim of different robbery, both times in absence of counsel; testimony as to both identifications held admissible); *Caldwell* v. *United States,* 338 F. 2d 385 (8th Cir., 1964) (eyewitness testimony as to identification at post-arrest "line-up", with no counsel present, held admissible); *State* v. *Fisher,* 410 P. 2d 216 (Ore., 1966) (post-arrest handwriting sample taken from accused who had not been advised of right to counsel held admissible); *Commonwealth* v. *Downer,* 159 Pa. Super. 626, 49 A. 2d 516 (1946) (testimony of eyewitness as to post-arrest identification of accused, exhibited alone, held admissible).

of Appeals—involved acceptance of theories as to a right to counsel at extra-judicial proceedings aimed at eliciting incriminating statements from an accused which the Court previously had either rejected outright (*e.g., Crooker* v. *California,* 357 U. S. 433; *Cicenia* v. *Lagay,* 357 U. S. 504 [claims of right to counsel at in-custody interrogation]) or had expressly declined to pass upon (*e.g., Spano* v. *New York,* 360 U. S. 315 [claim of right to counsel at post-indictment interrogation]).

At the time of the trial, this petitioner clearly had no federal constitutional right to the exclusion of the identification evidence either because of the manner of the identification or because it was made after arraignment. While an argument for exclusion as a matter of state law might have been urged,[1] some kind of objection or motion to exclude the testimony would have had to have been made. *People* v. *Feld,* 305 N. Y. 322, 332 (1953); *People* v. *Levine,* 297 N. Y. 144, 147-148 (1948). Petitioner's counsel, it seems clear, made a tactical choice not to seek exclusion. Such a choice would have been in keeping with his trial strategy; he sought to use the identification testimony to show that a different Negro man, who had previously worked in the same hospital as one of his victims, might have been the

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[1] Following the decision in *Spano, supra,* the New York Court of Appeals developed a State rule excluding post-indictment confessions obtained in the absence of counsel (*People* v. *DiBiasi,* 7 N. Y. 2d 544 [1961]; *People* v. *Waterman,* 9 N. Y. 2d 561 [1962]). The *DiBiasi-Waterman* rule—foreshadowed by the dissenting Court of Appeals judges in *Spano* (4 N. Y. 2d 256, 266-267) as well as by the concurring opinions in this Court (360 U. S. at 320, 324, 326)—was subsequently extended to post-arraignment confessions in two cases decided shortly before petitioner's trial commenced (*People* v. *Meyer,* 11 N. Y. 2d 162 [1962]; *People* v. *Rodriguez,* 11 N. Y. 2d 279 [1962]). The rule has not been completely inflexible, however; for example, it was not applied on appeal even in a capital case where the defendant had given testimony (forecast by his counsel in opening) which was virtually identical to his statements. *People* v. *Downs,* 8 N. Y. 2d 860 (1960), *cert. denied* 364 U. S. 867.

murderer.[1] Had defense counsel sought to exclude the identification testimony, the prosecutor might well have decided not to jeopardize an already very strong case by introducing it; at the very least the question would have been presented for appellate review.[2]

The reliance of the prosecutor and the state courts on the existing state of the law, and upon the trial tactics of the defense, is no less justified with respect to the use of the identification testimony in the present case than with respect to the use of illegally seized evidence or a statement obtained from a defendant in the absence of counsel. In some respects, it is more justified—surely it cannot be said that the evidence was obtained in violation of a clear constitutional command as was the case with the seizure of evidence in violation of Fourth Amendment, particularly following the decision in *Wolf* v. *Colorado*,

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[1] The defense focused on Walter Girodeau, a Negro who had been with petitioner earlier in the evening on which the murder was committed (3198-3209), who had worked as a male nurse in the same hospital where Mrs. Behrendt had practiced as a radiologist (2181-2182, 3237-3238), and who possessed several white jackets similar to the one taken from the Behrendt home on the night of the murder (3283-3289). It was the defense that first brought out the identification testimony (1803), and in summation, defense counsel emphasized the weaknesses in the identification. Counsel argued that Mrs. Behrendt had failed to notice obvious distinctive features of the petitioner and had in effect identified him solely on the basis of his color (4017-4019, 4026), and suggested that the much more likely suspect was Walter Girodeau (4037-4051). (Numbers in parentheses refer to folios in the printed record on the State appeal.)

[2] We do not suggest that the failure to object "waived" a constitutional right, since the claimed right to exclusion certainly was not in existence at that time. Of course, to the extent that the State might be held chargeable with knowledge of the now claimed right, the petitioner would be similarly chargeable. The case is illustrative of many in which a defendant seeks to gain release on collateral attack through an attack on the admission of evidence which he sought to use to his own advantage at trial. See, *e.g.*, *United States ex rel. Machado* v. *Wilkins*, 351 F. 2d 892 (2d Cir., 1965); *United States ex rel. Pizzaro* v. *Fay*, 353 F. 2d 726 (2d Cir., 1965). *Cf. Henry* v. *Mississippi*, 379 U. S. 443.

338 U. S. 24. Nor was its use at trial proscribed under any of the constitutional provisions now relied on by the petitioner. See *Spano* v. *New York, supra; Holt* v. *United States, supra; Breithaupt* v. *Abram, supra.*

Effects upon the administration of justice

While a substantial number of previous federal and state convictions would undoubtedly be affected by a decision sustaining this petitioner's claim to habeas corpus relief,[1] the release of convicted prisoners would be but one of many disruptive effects which would be caused by such a decision.

Application of a new exclusionary rule in this case would be quite inconsistent with previous cases in which the Court has upheld claims to habeas relief. The kinds of claims which have historically been recognized as warranting post-conviction relief are those which go to the fair-

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[1] The number of cases affected would, of course, depend on the scope of the new rule, but it would almost certainly be substantial. Judge Nathan Sobel has recently estimated that eyewitness problems occur five times as often as confession problems and 3½ times as often as search and seizure problems (New York Times, December 8, 1966, p. 53, col. 1). If a new rule were not limited to identifications but affected any evidence obtained after arraignment or indictment as a result of police contact with a defendant not then represented by counsel (*cf. McLeod* v. *Ohio,* 381 U. S. 356), a great number of cases could be affected, particularly those in which a defendant had jumped bail or been incarcerated in another jurisdiction prior to trial. Application of any such rule on collateral attack would, of course, afford significant advantages to a convicted prisoner who sought post-conviction relief on the basis of the new rule. Both on the collateral attack and upon retrial of the case, the passage of time—with the consequent dimming of memories, death or departure of witnesses, loss of relevant records, and possible intervening development of other previously unforeseen exclusionary rules—would inevitably work to the accused's advantage. See, e.g., *Linkletter* v. *Walker, supra,* at 637-38; *Tehan* v. *Shott, supra,* at 418-19; *Johnson* v. *New Jersey, supra,* at 731-32; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 478 (1963).

ness of the trial process itself, and which raise genuine doubt as to the reliability of the adjudication of guilt.[1] The absence of counsel at trial (*Gideon* v. *Wainwright*, 372 U. S. 335); the denial of opportunity to appeal (*Griffin* v. *Illinois*, 351 U. S. 12; *Eskridge* v. *Washington*, 357 U. S. 214; *Douglas* v. *California*, 372 U. S. 356); the use of an involuntary confession (*Reck* v. *Pate*, 367 U. S. 443; *Fay* v. *Noia*, 372 U. S. 391; *Townsend* v. *Sain*, 372 U. S. 293; *Davis* v. *North Carolina*, 384 U. S. 737); the use of an unfair and unreliable procedure for testing voluntariness (*Jackson* v. *Denno*, 378 U. S. 368); the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103); and trial under conditions of mob domination or inflammatory publicity (*Moore* v. *Dempsey*, 261 U. S. 86; *Irvin* v. *Dowd*, 359 U. S. 394; *Sheppard* v. *Maxwell*, 384 U. S. 333), fall into this category. These are the kinds of cases in which it can truly be said continued imprisonment is intolerable (*cf. Fay* v. *Noia*, *supra*, at 401-02, 442); where a defendant has really been afforded "no process of law."[2] These are the cases in which the judgment was, in effect, void *ab initio*, and thus subject to attack on federal habeas corpus just as any void judgment is always open to collateral attack. See *Fay* v. *Noia*, *supra*, at 423.

The instant case, like others in which claims to post-conviction relief have been based upon newly developed exclusionary rules, stands in striking contrast to those in which claims to post-conviction relief have been upheld by the Court. In its relevant aspects, this case is indistinguishable from *Johnson*, *Tehan* and *Linkletter*, *supra*. As in those cases, there is no doubt but that the petitioner was represented by counsel who had had adequate opportunity to pre-

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[1] See Brief for Respondent in *Angelet* v. *Fay*, No. 578, Oct. Term 1964, pp. 18-20, 32-36; *cf.* Mishkin, *The High Court, The Great Writ*, and the *Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965); *Linkletter* v. *Walker*, *supra*, at 636, n. 20.

[2] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-60 (1963).

pare for trial, nor is there any doubt as to the fairness of the trial process itself or as to the reliability of the adjudication of guilt. Surely this is the essence of due process.

Retroactive application of a new exclusionary rule affecting the use of identification evidence, or affecting the use of evidence obtained as a result of post-arraignment or post-indictment contact with an accused, would surely tend to inhibit the progressive development of other new rules in the criminal law field. The *Massiah*, *Escobedo* and *Miranda* decisions of this Court were founded substantially on the prior development of similar rules by the state courts, most notably the New York Court of Appeals and the California Supreme Court.[1] Yet it seems clear that one reason why these and other state courts have exercised their powers broadly in establishing new exclusionary rules is because of their expectation that the new rules would affect relatively few past cases.[2]

Significantly, the progressive New York and California rules, as well as the rules established in *Massiah*, *Escobedo* and *Miranda*, were all fashioned on direct appeal in cases where appropriate and timely objections were made to the introduction of the evidence in question. If collateral attack were to be made available for claims such as that of this petitioner—whose counsel made no effort to exclude the now-challenged evidence and in fact sought to gain some ad-

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[1] The *Massiah* decision noted some 10 New York decisions, most notably *People* v. *Waterman*, 9 N. Y. 2d 561 (1961); *People* v. *Rodriguez*, 11 N. Y. 2d 279 (1962); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); and *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). The *Escobedo* opinion relied on *People* v. *Donovan*, 13 N. Y. 2d 148 (1963). The *Miranda* opinion relied on the California decision in *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965).

[2] Both the New York and California courts have declined to apply their new rules retroactively to cases no longer in the direct appellate process. See, e.g., *People* v. *Howard*, 12 N. Y. 2d 65 (1963), cert. denied 374 U. S. 840 (1963); *People* v. *Dash*, 16 N. Y. 2d 493 (1965); *In re Lopez*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965).

vantage from its use[1]—it is to be expected that concepts of trial strategy would be adjusted accordingly. Surely the incentive of defense counsel to challenge an existing rule of law in a developing area would be lessened—a different course could be pursued at trial and, as here, a constitutional challenge could later be made on collateral attack. Both the lessened likelihood of challenge to existing rules and the spectre of further retroactive effects could be expected to inhibit state courts—and perhaps also the lower federal courts, which would have to cope with post-conviction applications from federal prisoners as well as state prisoners—from engaging in future constructive decision-making.

The concept of collateral relief which is implicit in petitioner's approach to the present case is an entirely new and unnecessary one. It is a concept which regards federal habeas corpus as indistinguishable from the direct appellate process, which ignores the fairness of the trial process and the reliability of the judgment of guilt, and which is directly contrary to the approach of the Court to similar problems in the *Linkletter*, *Tehan*, and *Johnson* cases.

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[1] The original panel in the Court below stated that it could see "no real excuse" for the failure to seek an exclusionary ruling prior to the introduction of the identification testimony (R. 29), but expressed "doubt that the Supreme Court would permit so demanding a standard in a capital case" (*id.*).

CONCLUSION

Assuming *arguendo* that the Court might establish a new rule limiting the admissibility of identification testimony obtained under circumstances such as existed in the present case, such an exclusionary rule should not be applied retroactively. The decision of the *en banc* Court below, affirming the denial by the District Court of petitioner's application for a writ of habeas corpus, should be affirmed.

Dated: New York, New York, December 24, 1966.

Respectfully submitted,

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State of New York
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IN THE

Supreme Court of the United States

October Term, 1966

No. 254

THEODORE STOVALL,

Petitioner,

vs.

WILFRED DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NEW YORK STATE DISTRICT ATTORNEYS' ASSOCIATION *AMICUS CURIAE*

H. RICHARD UVILLER
Assistant District Attorney
New York County
Counsel to
New York State District Attorneys' Association, *Amicus Curiae*

ERIC A. SEIFF
Assistant District Attorney
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1966

No. 254

THEODORE STOVALL,

Petitioner,

vs.

WILFRED DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NEW YORK STATE DISTRICT ATTORNEYS' ASSOCIATION *AMICUS CURIAE*

Questions Presented

(1) Is evidence, obtained by viewing the person of the defendant, following his arraignment on a criminal charge and without the attendance of counsel, excludable as offensive to the Sixth Amendment's guarantee of the assistance of counsel?

(2) In the present circumstances, where the defendant proved and used the evidence of a prior identification, is he precluded from asserting the alleged unconstitutionality of its acquisition?

Interest of *Amicus*

The New York State District Attorneys' Association is an intrastate organization of county prosecutors devoted to improving the quality of law enforcement. While the Association supports the positions taken by both respondent and the Attorney General of the State of New York, *amicus curiae,* its concern in this brief, filed with the consent of the parties, is limited to the scope of the Sixth Amendment's guarantee of the assistance of counsel to an accused in a criminal prosecution, and the constitutional magnitude of any deprivation thereof in the present circumstances.

POINT I

The right of an accused to counsel, guaranteed by the Sixth Amendment, does not extend to extrajudicial events where no legal service can be rendered.

On the morning following his arrest for homicide, the petitioner was arraigned, at which time he stated his desire to retain an attorney. Consigned to the custody of local police for delivery to the sheriff, petitioner was taken to a nearby hospital on the way to the jailhouse. There Mrs. Behrendt, a physician widowed the previous evening when her husband was murdered before her eyes, clung uncer-

tainly to life after an operation to repair the wounds she had suffered during that attack. Confronted with the petitioner, Mrs. Behrendt identified him as her assailant and her husband's murderer. At the trial, evidence of the prior bedside identification was adduced from other witnesses by the defense; then Mrs. Behrendt herself took the stand, identified the defendant, and confirmed the hospital identification. In addition to Mrs. Behrendt's eyewitness testimony, "massive evidence" irresistibly pointed to the petitioner's guilt (R32).

Among petitioner's constitutional claims is an assertion that his Sixth Amendment right to counsel was violated when he was brought to Mrs. Behrendt's hospital bedside without representation. He places great emphasis on the fact that this confrontation occurred after his arraignment. But the Sixth Amendment's protection was inappropriate to that occasion, and hence the petitioner enjoyed no constitutional right to the attendance of a lawyer. The temporal happenstance of the immediately preceding arraignment did not mechanically trigger an all-covering umbrella; the right to counsel after the commencement of court proceedings is more selectively shielding.

Fundamentally, the right to counsel, the child of an adversary system of justice, protects by empowering the accused to meet, challenge, parry, and riposte against a presumably well-armed advocate of guilt. Civilization demands that the field of combat be a court of law, where the defendant's champion is professionally equipped to countervail within the peculiar framework of the legal process. Here, the battle is transmuted into an orderly dialectic. How gross a perversion of the benefits of legal counsel were

the contest permitted to overleap the metes of the courtroom and rage in the streets. Surely, the principle governing the right does not direct that counsel devote his energy and talent to blocking the fair and lawful discovery and evaluation of evidence. Such service, albeit in the interests of the accused, is not within the compass of legal representation.

The point at which the right to an attorney's assistance materializes is, appropriately, the point at which the case moves into the court: arraignment. This event signals a need for professional services professionally rendered; the right responds to the need. But the point of arraignment is not an arbitrary time-spot in the maturing of a prosecution, nor is providing a lawyer a ceremonial rite. Hence his guard is thereafter necessary only at "critical stages," which means, simply, when there is law work to be done. He is not required at all times and places after arraignment where something may occur which could adversely affect the defendant. Affording no opportunity for the performance of legal services, many events lawfully transpire without the participation of counsel. For example, the prosecutor interviews witnesses, evidence is subjected to laboratory analysis, or a photograph is taken of the scene. Nor is counsel's presence obligatory merely because the person of the defendant is involved in the occurrence: the defendant confides in a friend, his fingerprints are taken or blood is drawn for analysis. That a lawyer, or for that matter any third person, might learn from these events, or suggest other modes of performance of investigatory tasks, does not endow the attorney or other third party with the right of presence or participation. Nor does the accused acquire the right to have such a person present from

the possibility of contingent benefit. The right to legal services cannot include the right to supervise a laboratory procedure or a line-up.

Certainly, the right to effective representation reaches beyond the courtroom to the extent that a lawyer must have the opportunity to prepare. But preparation is an affirmative concept. A defense is not prepared by attempting to influence the prosecution's development of evidence. Here a separation of functions must be preserved. As the prosecutor enjoys no privilege to attend the defense counsel's interviews with witnesses or other factual forays, no reciprocal right can be claimed by the defense. For these preparatory phases of a case are and should be independently pursued. Indeed, joint development of evidence would subject both sides to charges of collusion, jeopardizing the jury's traditional fact-finding role.

A textual analysis of the Sixth Amendment confirms this view of the proper role of legal counsel, and thereby defines the bounds of the accused's right to representation. The right to counsel is couched among several other guarantees, obviously deemed by the framers to be united in a common genre. A "speedy and public trial" must be accorded before "an impartial jury" impaneled in a previously defined district which encompasses the site of the crime. It is requisite that the "nature and cause of the accusation" be presented to the defendant, that he have the opportunity of confronting his accusers (in court), and that he have access to "compulsory process for obtaining witnesses." Each of these significant Sixth Amendment guarantees is firmly and exclusively related to judicial pro-

ceedings. The last on the list, the right to "the assistance of counsel for his defense," is bound to its predecessors by its primary orientation to court activities.

Moreover, the clause itself announces not a right of counsel, but a right to the "assistance" of counsel. The inclusion of this term in the constitutional language is not without significance. Its import harmonizes with the context. Assistance is required where assistance can be rendered. And legal assistance to a defendant is normally requisite in a courtroom, preparatory to entering a courtroom, or, in very limited instances, where important legal decisions must be made by the defendant outside the courtroom.

The authorities further demonstrate that this essential right is associated with courts and what happens within them. In 1961, this Court took the position that the Sixth Amendment commands a lawyer's presence at the accused's side in court when, under local law, there is vital legal counselling to be done. Since, under Alabama law, defenses must be raised at arraignment or lost irretrievably, this was deemed a "critical stage" and "[o]nly the presence of counsel could have enabled [the] accused to know all the defenses available" [*Hamilton* v. *Alabama*, 368 U. S. 52, 59 (1961)].

Subsequent to the foreordained decision of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), in which the right to counsel at trial was extended to all those accused of felony in state tribunals, this Court again considered the question of a defendant's right to counsel at a preliminary proceeding. In *White* v. *Maryland*, 373 U. S. 59 (1963), the Court

relied on the "critical stage" doctrine of *Hamilton* (*supra*). If a withdrawn guilty plea can be proved at trial as an admission, the Court reasoned, then there were legal offices to be performed at the stage at which it was entered, and hence the constitutional injunction is activated.

In contrast to the real and substantial need for legal services which was held to generate the right to counsel in these cases, neither the dissent below nor petitioner here has been able to discover a lawyer's function in Mrs. Behrendt's hospital room. Instead, they hypothesize various practical suggestions counsel might have made, such as attempting to round up some hospital personnel for a line-up. This approach is faulty on two counts. Such cooperative suggestions to improve the probative quality of the identification are hardly the equivalent of a legally skilled decision as to what defenses to assert at arraignment. Second, any suggestions which counsel might offer would be advisory only. It is now clear that a suspect enjoys no constitutional immunity against subjecting himself (including his voice timbre) to physical scrutiny which may reveal guilt, and further, it is established that his counsel cannot create such immunity by asserting it [*Schmerber* v. *California*, 384 U. S. 757 (1966). See also, *Kennedy* v. *United States*, 353 F.2d 462, 464 (D. C. Cir. 1965)]. In the light of these precepts, the legal uselessness of counsel in the hospital room is distinctly discernible.

Even Judge FRIENDLY, for the panel majority below, grants the unlikelihood that counsel's presence in the hospital room would have altered events, and notes that such requests as he might interpose could have been refused

without denial of any federally protected rights [R31]. And the *en banc* reversal [per MOORE, C.J.] of Judge FRIENDLY's decision forcefully eradicates any lingering belief that a lawyer could have done anything to "thwart the identification," since no evidence was there obtained which counsel could have "rightfully advised Appellant to refuse to yield" [R48-49; *Kennedy* v. *United States*, 353 F.2d 462 (D. C. Cir. 1965)]. Moreover, the inutility of lawyers at viewing proceedings has been attested by the experience of the Police Department in Philadelphia, Pennsylvania. There, for more than two years, the police have advised counsel before placing their incarcerated clients in line-ups.* Not once has a lawyer appeared at these proceedings [see Appendix I, p. A1, *infra*].

Massiah v. *United States*, 377 U. S. 201 (1964) appears to stand virtually alone against strict court-bound scope for the right to counsel. [See FRIENDLY, C. J., dissenting from the *en banc* decision below (R56, n. 3).] Based on the counsel clause, the Court reversed a conviction for the use of evidence obtained outside the courtroom from the accused after indictment in the absence of his lawyer.

Yet there is grave danger in over-reading that opinion. Justice STEWART, its author, recognizing that the holding might be misapplied to inhibit post-indictment investigation, took particular care to limit sharply the effect of the decision. Repeatedly, the precise holding is stated in terms of the facts of that case: the use against the defendant of his own incriminating words deliberately and secretly

* This is the practice mentioned in *Rigney* v. *Hendrick*, 355 F.2d 710, 714 (3d Cir. 1965).

elicited after indictment in the absence of counsel. The distinctive feature of the case is that the evidence was "testimonial" in nature, oral communications which Massiah had the right not to give. Consequently, Massiah's lawyer, unlike Stovall's, had real legal assistance to tender. He could have counseled his client to silence. Thus, the out-of-court services of a lawyer were assured by *Massiah* in defined circumstances: after the commencement of legal proceedings (*i.e.*, indictment), and where there is meaningful legal counselling to be done. *Massiah* acknowledges the paternity of *Spano* v. *New York*, 360 U. S. 315 (1959), and the family resemblance is visible. Both govern post-indictment police questioning in one form or another. Without the crucial factor of testimonial evidence, the instant case cannot be brought within *Massiah's* control. In brief, as observed by Chief Judge LUMBARD, concurring below, *Massiah* should not apply to

> "circumstances which do not ultimately involve the danger of self-incrimination. * * * Only when police conduct threatens to violate a personal right of the defendant that retains vitality during detention—e.g. the privilege against self incrimination—or when police practices unfairly prevent the defense attorney from preparing his case—a literal deprivation of the right to counsel—must a court interfere to guarantee that the right is properly preserved" [R50-51, n. 1].

If *Massiah* cannot today be read as narrowly as its own opinion appears to direct, then it has overstepped its rationale and should fall. Indeed, its rationale but weakly supports the limited holding; it cannot soundly rule Stovall's situation. No more eloquent exposition of *Massiah's* flaws can be set forth than that penned by Justice WHITE

for the dissenting members of this Court. Flatly put, if *Massiah* must be read to control *Stovall*, it should be overruled, for it is operating far outside the proper scope of the right upon which it is founded.

In sum, the Sixth Amendment awarded the defendant no right to be supplied with counsel at Mrs. Behrendt's hospital bedside where there were no legal decisions to be made, no legal counsel to be tendered, and no authoritative legal influence to be exerted over the events, procedures, or results. It would be as well for the petitioner to argue that he had a right to have an attorney present when a Chinese laundryman identified the defendant's bloody shirt found at the site of the murder. Nor did petitioner acquire any greater constitutional protection because the confrontation occurred just after arraignment rather than just before. This point in time calls for a lawyer's participation only where he has legal assistance to offer.

POINT II

The rule of reason, guiding constitutional construction, should condone the action of law enforcement authorities in the presented circumstances.

In essence, the Constitution enjoins upon the states fair and reasonable practices in dealing with those suspected of crime. And what is reasonable depends, to a large extent, upon a realistic view of the circumstances. For law enforcement should not be constrained by an arbitrary rubric.

Here, investigating an extremely vicious crime, the authorities took a suspect into custody, hastening to respect

his right to prompt arraignment. Meanwhile, the sole surviving eyewitness, Mrs. Behrendt, lay gravely wounded. As Judge Moore, dissenting from the panel's reversal below, aptly pointed out, it would have been grievous neglect of duty had the police omitted a hospital confrontation [R34-35]. It might have been the last chance for the defendant to be definitively exonerated. And as things appeared at that time, the improvised confrontation could not be delayed to improve the probity of the result.

Implicitly, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), counsels the states to pursue investigation of crime apart from interrogation of the accused. Surely, in availing themselves of the earliest (and perhaps last) opportunity for the witness to view the suspect, the authorities here were acting in full accord with sound principles of investigation.

> "The police should not have overlooked the possibility of his exoneration, which could be easily and swiftly resolved by 'quick verification' in a confrontation." *Kennedy* v. *United States*, 353 F.2d 462, 464 (D. C. Cir. 1965).

It may be countered that, while it was commendable for police to present the suspect to Mrs. Behrendt, it was error of constitutional magnitude to present her affirmative identification to the jury at the trial. Parenthetically, it should be noted that the law of New York allows proof of a prior identification only when identity is in issue, and then only from the witness who personally made the previous identification [N. Y. Code Crim. Proc. §393(b); see *People* v. *Trowbridge*, 305 N. Y. 471 (1953); *People* v. *Caserta*, —— N. Y. 2d ——, opinion of December 30, 1966]. However,

what error there might have been in that regard* does not survive the state court's affirmance of the judgment. And it is not here argued that the proof of prior identification in itself constitutes error of constitutional dimension.

The constitutional implications of the identifications obtained without counsel's participation cannot be realistically assessed without consideration of the use made of the evidence at petitioner's trial. Cf. *United States ex rel. Fernanders* v. *Fay,* 241 F.Supp. 51 (S.D.N.Y. 1965); aff'd *sub nom. United States ex rel. Fernanders* v. *Wallack,* 359 F.2d 767 (2d Cir. 1966); *cert. denied* —— U. S. —— (1966). While obviously the petitioner did not benefit from the confrontation by a negative identification, he did derive a major benefit: the incident provided him with his only defense. True, the prosecutor, perhaps anticipating that identification would be the paramount issue at trial, mentioned the hospital incident in his opening —a costly "blunder" [R32]. But it was the defendant who exploited the evidence in his own cause. The first proof of the hospital confrontation was adduced by the defense in cross-examination of a prosecution witness who had attended it. Inadmissible if sought by the People, this evidence formed the cornerstone of the defense: that Mrs. Behrendt identified the defendant in court not as the culprit she saw committing the crime, but as the person the police brought to her *as the culprit* in her hospital room. Indeed, the petitioner's present argument attacking the fairness of the "show-up" procedure, which consumes the major part of his brief [pp. 9-11, 14-16], echoes the defense at trial

* In his brief to the United States Court of Appeals petitioner conceded that the foundation for Mrs. Behrendt's testimony of prior identification had been laid by defense counsel (petitioner's brief to Court of Appeals, 2d Cir., p. 48).

wherein the very factors recited to this Court were stressed to the jury to undercut the reliability of Mrs. Behrendt's courtroom identification of Stovall (Record on Appeal to the New State Court of Appeals, folios 4017-4027).

Chief Judge LUMBARD, concurring in the *en banc* decision below, concluded on the basis of the trial record that the "fairest method of handling" the identification issue was to let the jury know the full facts concerning the hospital room procedure [R53-54]. Judge FRIENDLY, writing for the majority of the panel below [R29], found "troublesome" the failure of the defense to object to the District Attorney's opening reference to the hospital identification, which, he felt, removed significance from the defense elicitation of the proof. However, while seeing "no real excuse for this omission," Judge FRIENDLY passed over the point, noting only his "doubt that the Supreme Court would permit so demanding a standard in a capital case." First, it should be recognized that this is not a capital case in any real sense, in view of the announced intention of the Governor of New York to commute all death sentences pronounced before capital punishment was restricted in New York, including Stovall's [see Appendix II, p. A2, *infra*]. Secondly, Judge FRIENDLY's doubt appears ill-founded; it is not an unduly exacting standard to deprive a defendant of claims of error predicated upon counsel-chosen trial tactics. For it is quite apparent from the record that the petitioner's use of the evidence was no mere response to the prosecutor's ill-advised opening announcement.

Such use by the defendant of otherwise inadmissible evidence, the high court of New York has recently ruled, deprives him of the claim of error [*People* v. *DeRenzzio*,

——N.Y.2d —— (Decided December 30, 1966; *People* v. *Castro,* —— N.Y.2d ——(decided December 30, 1966)]. The right to counsel itself imports meaningful representation on trial by a skilled advocate. His trial tactics must be regarded as the product of reasoned choice and cannot be so easily ignored or overruled by appellate counsel who, with benefit of hindsight, deems the election a poor one.

Thus, in the present case, the course followed by the police in obtaining a hospital identification was fair and reasonable and not to be deterred by an exclusionary rule. The results of that confrontation were proved at trial by the defense as part of a calculated, counsel-directed strategy, and hence the introduction of the evidence entailed no abridgment of the defendant's constitutional rights.

Conclusion

The order and judgment of the Court of Appeals for the Second Circuit,* en banc, *dated January 31, 1966, should be affirmed.

Respectfully submitted,

H. Richard Uviller
Assistant District Attorney
New York County
Counsel to
New York State District Attorneys' Association, *Amicus Curiae*

Eric A. Seiff
Assistant District Attorney
Of Counsel

January, 1967

Appendix I

CITY OF PHILADELPHIA

January 20, 1967

H. Richard Uviller, Asst. District Attorney
New York County District Attorney's Office
155 Leonard Street
New York, New York 10013

Dear Mr. Uviller:

Please be advised that we of the Law Department represent the Police Department of the City of Philadelphia and that the following information, in response to your inquiry, is being submitted to you on behalf of the Philadelphia Police Department:

(1) Since December 1964 it has been the practice of the Philadelphia Police Department to give the Voluntary Defender and private defense counsel 72 hours' notice of the weekly formal line-up. Since the adoption of this procedure no defense attorney has appeared at the line-up.

(2) The formal line-ups in Philadelphia in every instance have been held after the preliminary arraignment and detention of the suspect on a prior charge.

(3) The notification procedure mentioned above applies to persons suspected of both felonies and, occasionally, misdemeanors.

Please let me know whether you desire any additional information concerning the operation of the Police line-up in Philadelphia.

Very truly yours,

s/ Theodore H. Lunine
Assistant City Solicitor

Appendix II

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

January 17, 1967

Mr. Eric Seiff
Assistant District Attorney
New York County
New York, N. Y. 10013

Dear Mr. Seiff:

Pursuant to your request of January 16th, I am enclosing a copy of the Governor's statement with respect to his policy on commutations.

I am not able to send you the copy of Theodore Stovall's letter which you requested since we must treat all such correspondence as confidential. It should be noted, however, that, in accordance with the policy announced in the enclosed press release, all condemned prisoners were advised in the Fall of 1965 of the Governor's intention to commute their sentences upon the affirmance of their conviction by the Court of Appeals. All those prisoners whose cases had been finally affirmed were advised that their sentence would be commuted on a specific date unless they requested a delay. All those whose sentences had not been finally affirmed as of that time were informed that their sentence would be commuted shortly after the final affirmance unless they specifically requested a delay.

In accordance with this policy, several sentences have been commuted and all remaining sentences will be commuted.

Sincerely yours,

David G. Hassi
Assistant Counsel

Enclosure

Appendix II

FOR THE CONVENIENCE OF THE COURT, the statement of the Governor released on June 1, 1965, is set forth in its entirety below:

STATEMENT BY GOVERNOR ROCKEFELLER

In view of my action today approving the bill with respect to capital punishment, it is also my intention that, without inquiring into the individual merits of each case, persons now convicted and sentenced to capital punishment, who are not subject to capital punishment under the new law, will be granted executive clemency and their sentences commuted to life imprisonment when their cases have run their courses in the courts. As to persons who would still be subject to capital punishment under the new law, I shall continue to review the individual merits of each case before deciding whether to grant executive clemency.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 254

Tennessee Survick,

Petitioner,

vs.

Honorable William L. Rives, Warden,

Respondent.

REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 254

THEODORE STOVALL,

Petitioner,

vs.

HONORABLE WILFRED L. DENNO, Warden,

Respondent.

REPLY BRIEF OF PETITIONER

Although the counsel for the Respondent litigant has met Petitioner's claim on the merits both here and in the court below, the briefs filed by the Amici District Attorney and Attorney General have raised certain procedural and factual questions which have not been treated with directly by the parties. In this Brief we intend only to deal with those new issues presented by the amici.

I

1. The Amicus District Attorney insists that Petitioner's counsel is responsible for bringing before the jury the facts relating to the prior identification by Mrs. Behrendt.

This argument ignores the undisputed fact that on the very first day of trial the prosecutor informed the jury that

there would be testimony of prior identification by Mrs. Behrendt,[1] and in fact such promised testimony was given by Mrs. Behrendt on her direct examination.[2]

The exception here taken by the Amicus to the availability to Petitioner of his claim is that trial defense counsel, relying upon the prosecutor's opening address, cross-examined other witnesses as to the suggestive nature of the identification procedure *prior* to the testimony of Mrs. Behrendt.

As Judge Friendly noted below in the panel decision, at R. 29,

> "... defense counsel's attempt to discredit such evidence in advance, while the detectives were available for cross-examination, rather than having to recall them, cannot fairly be deemed an independent attempt to introduce the identification as part of Stovall's case."

Judge Moore, first in his panel dissenting opinion and then in the Court opinion upon the *in banc* consideration, took no issue with Judge Friendly's finding that the conduct of defense counsel in no way precluded federal review of the merits. Only in Chief Judge Lumbard's concurring opinion is there any indication that *any* circuit judge thought this question—which essentially involves the order of proof—might be precluded from federal review.

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[1] Petitioner's Brief, p. 6; Folios 237-38.

[2] Petitioner's Brief, p. 33; Folio 2076.
The Amicus District Attorney insists that this opening was a "blunder" (Brief, p. 12) and "ill-advised" (Brief, p. 13). On the contrary, it appears to have been a highly dramatic and effective way of highlighting the forthcoming testimony. In any event, once in, defense counsel was entitled to lessen its impact.

2. Again on a waiver or invited-error type theory the Amicus District Attorney relies upon the absence of objection and trial defense counsel's attack in summation on the validity of the identification as grounds for precluding federal consideration of the merits.

Even if *White* v. *Maryland*, 373 U.S. 59 (1963) were not controlling here, the overall picture is well within the ruling in *Jackson* v. *Denno*, 378 U.S. 368 (1964) where defense counsel did not object to a confession and urged that the manner of taking went only to its weight (378 U.S. at 423-24, dissenting opinion, Clark, J.).

As with the preceding argument, the majority and dissenting judges in both the panel and *in banc* decisions have refused to find a waiver by the absence of trial objection or defense counsel's purported use of the challenged evidence.

At page 11 of the Amicus District Attorney's Brief, footnote reference is made to Petitioner's Brief in Court of Appeals as having,

> "...conceded that the foundation for Mrs. Behrendt's testimony of prior identification had been laid by defense counsel."

There was no such concession made.

The *full* text of the purported concession is:

> "Prior to the testimony of Mrs. Behrendt defense counsel laid the foundation *for the impeachment* of this promised and statutorily authorized evidence of prior identification." (Emphasis added.)

To the degree that the determination by the circuit judges that the claim was preserved for consideration on the merits

rests upon discretion or interpretation of local law, that determination should be unassailable here.

II

1. The Amicus Attorney General has raised the spectre of retroactivity as a bar to relief.

Apart from the fact that the counsel for the Respondent-litigant raises no such question, the problem is illusory in this case. The right-to-counsel claim is here grounded on this Court's decision in *Hamilton* v. *Alabama*, 368 U.S. 42 which was decided on November 13, 1961, almost a year prior to the trial and conviction of the Petitioner.

2. But both Amici urge that this case is not governed by the capital case rule of *Hamilton* and *White* v. *Maryland*, 373 U.S. 59 (1963), because of the proposed commutation of sentence announced by the Governor of New York.

Apart from the fact that Petitioner is still held under a judgment of death (compare with the proposed pardon in *Fay* v. *Noia*, 372 U.S. 391, 476 [dissenting opinion] which would have mooted that case) the doctrine advanced by the Amici is too unrealistic and unworkable to find sanction in judicial opinion.

This case started out as a capital case and has been treated as such through the state and lower federal courts.[3]

[3] The Governor's statement of June 1, 1965 (Appendix II, Brief of Amicus District Attorney) was made and published seven months prior to the *in banc* decision where all circuit judges treated the case as still a capital case. Indeed that appears to be the expressed intention of the Governor for in a letter to Mr. Stovall (not a part of the record) Governor's counsel on June 4, 1965, informed Petitioner of the Governor's statement and added, "To avoid any pos-

The right which this Court enforced in *Hamilton* is not one which has to remain inchoate until the defendant is strapped into the electric chair. Under the approach of the Amici, enforcement of *Hamilton* must rest upon an arraigning judge's guess as to whether a judgment of death will be imposed and ultimately executed.

3. Not to be overlooked is the fact that one of Petitioner's claims presented *pro se* to the district court (R. 5-8) was that assigned counsel in the state court proceedings failed to petition this Court for a writ of certiorari after representing that he would do so. If, as the Amicus Attorney General suggests, the claim here presented is one which can be raised only directly, as distinguished from collaterally, then the claim of denial of access to this Court takes on constitutional significance.

III

The Amicus District Attorney has in his argument (Brief, p. 8) and Appendix I, gone beyond the record to recite the Philadelphia experience with counsel at the formal line-up proceedings. Our objection to this amplification of the record is not based upon technical concepts of what should or should not be considered by the Court. Our objection is founded upon the fact that Appendix I does not go far enough, and to that extent is misleading and inaccurate.

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sibility of prejudice to any action which may be pending in the courts, the Governor will not act unless the Court of Appeals has affirmed the conviction and other court actions are concluded."

Also to be noted is that since this case went through the New York courts as a capital case, Petitioner had the benefit of only one appellate review, directly to the Court of Appeals. As a non-capital case, Petitioner would have appellate review available in both the Appellate Division of the Supreme Court and the New York Court of Appeals.

We have been advised by the Defender Association of Philadelphia, that a report by its staff attorney who attended at one of the line-ups referred to in Appendix I of Amicus' Brief, indicated that:

> "Under Philadelphia practice the individual in a formal line-up is lined-up with three other individuals and never alone. The other participants in the line-up may be other prisoners or police officers. The person directing the line-up (a police lieutenant) makes certain that the physical characteristics of the individuals lined-up at any one time conform. The attempt to conform the physical characteristics of the participants relates to their height, weight, age, race and clothing they are wearing."

It was *because* the agency was satisfied with fairness of the then Philadelphia procedure that the considered decision was made not to appear at the line-ups.

We offer this non-record material to rebut the "inutility of lawyers" argument advanced on the basis of the Philadelphia experience.

We suggest that perhaps the line-ups in Philadelphia are fair ones because of the fact that they are not secret and always subject to visitation by counsel; and we suggest that it is only because the procedure is a fair one that Philadelphia counsel have made the choice not to attend. Where Philadelphia counsel thought the line-ups were unfair a challenge was in fact made.[4]

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[4] The Philadelphia defender agency has attacked the line-ups only on the theory that it is an equal protection violation to line up only those defendants who are too poor to be released on bail. See, *Rigney* v. *Hendrick*, 355 F. 2d 710 (3rd Cir., 1965).

IV

The Amicus District Attorney's Brief (pp. 2-3) and the Respondent contend that necessity compelled the prompt production of Petitioner before Mrs. Behrendt. This misconception deserves to be laid to rest, for neither in fact or law did Mrs. Behrendt " . . . cling uncertainly to life. . . . " as the Amicus has alleged.

Dr. Montgomery testified that he operated on Mrs. Behrendt at about 2:00 a.m. on August 24th, cleaning her wounds and sewing up the lacerations (Folios 733, 737). About thirty-six hours later the Petitioner was taken by Detectives Rofheart and Stalter to the hospital (Folios 1138-1141, 1807). They waited outside while Mrs. Behrendt was taken from her bed, put into a wheelchair and taken to the adjoining room where the show-up took place (2271-2272). This, together with the presence of the group of officers and prosecutors negates the factual assumption of the Respondent.[5]

Even apart from the factual fallacy of the Respondent's argument, the argument is untenable as a matter of law.

If Mrs. Behrendt were in danger of death, the identification procedure would have meaning only if made as part of a dying declaration. No attempt whatsoever was made to have the show-up identification meet the rigid test of the

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[5] In his dissent Judge Friendly, at R. 58, notes:

> "Grievous as Mrs. Behrendt's injuries had been, nothing in the record indicates that her life was any longer considered to be in peril when Stovall was brought before her; the presence of five police officers and prosecutors in her hospital room would argue to the contrary—and also tends to negate the suggestion that Stovall had to be brought in alone."

common law requirements of a dying declaration.[6] The absence of such procedure compels the legal conclusion that the show-up was not impelled by the impending death of the only eye-witness.

Respectfully submitted,

LEON B. POLSKY
The Legal Aid Society
Counsel for Petitioner

[6] Under New York law, a dying declaration is one which is " . . . made in extremity, when the party is at the point of death and when every hope in the world is gone" *People* v. *Gezzo*, 307 N.Y. 385, 393 (1954). Stated another way, there must be a " . . . settled, hopeless expectation that death is near at hand and what is said must have been spoken in the burst of its impending presence" *People* v. *Miller*, 270 App. Div. 107 (1945).

SUPREME COURT OF THE UNITED STATES

No. 254.—October Term, 1966.

Theodore Stovall, Petitioner,
v.
Wilfred Denno, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1967.]

Mr. Justice Brennan delivered the opinion of the Court.

This federal habeas corpus proceeding attacks collaterally a state criminal conviction for the same alleged constitutional errors in the admission of allegedly tainted identification evidence that were before us on direct review of the convictions involved in *United States* v. *Wade, ante,* and *Gilbert* v. *California, ante.* This case therefore provides a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively. See *Linkletter* v. *Walker,* 381 U. S. 618; *Tehan* v. *Shott,* 382 U. S. 406; *Johnson* v. *New Jersey,* 384 U. S. 719.[1] A further question is whether in any event, on the facts of the particular confrontation involved in this case, petitioner was denied due process of law in violation of the Fourteenth Amendment. Cf. *Davis* v. *North Carolina,* 384 U. S. 737.

Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island, about midnight.

[1] Although respondents did not raise the bar of retroactivity, the Attorney General of the State of New York, as *amicus curiae,* extensively briefed the issue of retroactivity and petitioner, in his reply brief, addressed himself to this question. Compare *Mapp* v. *Ohio,* 367 U. S. 643, 646, n. 3.

August 23, 1961. Dr. Behrendt's wife, also a physician, had followed her husband to the kitchen and jumped at the assailant. He knocked her to the floor and stabbed her 11 times. The police found a shirt on the kitchen floor and keys in a pocket which they traced to petitioner. They arrested him on the afternoon of August 24. An arraignment was promptly held but was postponed until petitioner could retain counsel.

Mrs. Behrendt was hospitalized for major surgery to save her life. The police, without affording petitioner time to retain counsel, arranged with her surgeon to permit them to bring petitioner to her hospital room about noon of August 25, the day after the surgery. Petitioner was handcuffed to one of five police officers who, with two members of the staff of the District Attorney, brought him to the hospital room. Petitioner was the only Negro in the room. Mrs. Behrendt identified him from her hospital bed after being asked by an officer whether he "was the man" and after petitioner repeated at the direction of an officer a "few words for voice identification." None of the witnesses could recall the words that were used. Mrs. Behrendt and the officers testified at the trial to her identification of the petitioner in the hospital room, and she also made an in-court identification of petitioner in the courtroom.

Petitioner was convicted and sentenced to death. The New York Court of Appeals affirmed without opinion. 13 N. Y. 2d 1094, 196 N. E. 2d 65. Petitioner *pro se* sought federal habeas corpus in the District Court for the Southern District of New York. He claimed that among other constitutional rights allegedly denied him at his trial, the admission of Mrs. Behrendt's identification testimony violated his rights under the Fifth, Sixth, and Fourteenth Amendments because he had been compelled to submit to the hospital room confrontation without the help of counsel and under circumstances which unfairly focussed the witness' attention on him as the

man believed by the police to be the guilty person. The District Court dismissed the petition after hearing argument on an unrelated claim of an alleged invalid search and seizure. On appeal to the Court of Appeals for the Second Circuit a panel of that court initially reversed the dismissal after reaching the issue of the admissibility of Mrs. Behrendt's identification evidence and holding it inadmissible on the ground that the hospital room identification violated petitioner's constitutional right to the assistance of counsel. The Court of Appeals thereafter heard the case *en banc*, vacated the panel decision, and affirmed the District Court. 355 F. 2d 731. We granted certiorari, 384 U. S. 1000, and set the case for argument with *Wade* and *Gilbert*. We hold that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date. The rulings of *Wade* and *Gilbert* are therefore inapplicable in the present case. We think also that on the facts of this case petitioner was not deprived of due process of law in violation of the Fourteenth Amendment. The judgment of the Court of Appeals is, therefore, affirmed.

I.

Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. *Linkletter* v. *Walker*, *supra*; *Tehan* v. *Shott*, *supra*; *Johnson* v. *New Jersey*, *supra*. "These cases establish the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application' . . . ." *Johnson*, *supra*, 384 U. S., at 726–727. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old

standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson, supra,* at 728.

Wade and *Gilbert* fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel. A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so.

It is true that the right to the assistance of counsel has been applied retroactively at stages of the prosecution where denial of the right must almost invariably deny a fair trial, for example, at the trial itself, *Gideon* v. *Wainwright,* 372 U. S. 335, or at some forms of arraignment, *Hamilton* v. *Alabama,* 368 U. S. 52, or on appeal, *Douglas* v. *California,* 372 U. S. 353. "The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *Shott, supra,* at 416. We have also retroactively applied rules of criminal procedure

fashioned to correct serious flaws in the fact-finding process at trial. See for example *Jackson* v. *Denno*, 378 U. S. 368. Although the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson* v. *New Jersey*, *supra*, at 728–729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities." *Ibid.* Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.

We have outlined in *Wade* the dangers and unfairness inherent in confrontations for identification. The possibility of unfairness at that point is great, both because of the manner in which confrontations are frequently conducted, and because of the likelihood that the accused will often be precluded from reconstructing what occurred and thereby from obtaining a full hearing on the identification issue at trial. The presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. We have, therefore, concluded that the confrontation is a "critical stage," and that counsel is required at all confrontations. It must be recognized, however, that, unlike cases in which counsel is absent at trial or on appeal, it may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial. Therefore, while we feel that the exclusionary rules set forth in *Wade* and *Gilbert* are justified by the need to assure the integrity and reliability of our system of justice, they undoubtedly will affect cases in which no unfairness will be present.

Of course, we should also assume there have been injustices in the past which could have been averted by having counsel present at the confrontation for identification, just as there are injustices when counsel is absent at trial. But the certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application, especially in light of the strong countervailing interests outlined below, and because it remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law. See *Palmer* v. *Peyton*, 359 F. 2d 199 (C. A. 4th Cir. 1966).

The unusual force of the countervailing considerations strengthen our conclusion in favor of prospective application. The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification. Today's rulings were not foreshadowed in our cases; no court announced such a requirement until *Wade* was decided by the Court of Appeals for the Fifth Circuit, 358 F. 2d 557. The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury. Wall, Eyewitness Identification in Criminal Cases 38. Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel. It is, therefore, very clear that retroactive application of *Wade* and *Gilbert* "would seriously disrupt the administration of our criminal laws." *Johnson* v. *New Jersey*, *supra*, at 731. In *Tehan* v. *Shott*, *supra*, we thought it persuasive against retro-

active application of the no-comment rule of *Griffin* v. *California*, 380 U. S. 609, that such application would have a serious impact on the six States that allowed comment on an accused's failure to take the stand. We said, "To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact on the administration of their criminal law so devastating as to need no elaboration." 382 U. S., at 419. That impact is insignificant compared to the impact to be expected from retroactivity of the *Wade* and *Gilbert* rules. At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine taint, if any, in identification evidence, and whether in any event the admission of the evidence was harmless error. Doubtless, too, inquiry would be handicapped by the unavailability of witnesses and dim memories. We conclude, therefore, that the *Wade* and *Gilbert* rules should not be made retroactive.

We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable. We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies,[2] and in the possible effect upon the incentive of

[2] Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907, 930–933 (1962).

counsel to advance contentions requiring a change in the law,[3] militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue.[4] But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

II.

We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer* v. *Peyton*, 359 F. 2d 199 (C. A. 4th Cir. 1966). The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.[5] However, a claimed violation of due process of law in the conduct

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[3] See Mishkin, Forward, The Supreme Court 1964 Term, 79 Harv. L. Rev. 56, 60–61 (1965).

[4] See Mishkin, n. 3, *supra*, at 61, n. 23; Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650, 675–678 (1962); Schwartz, Retroactivity, Relinbility, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 764 (1966).

[5] See Wall, Eyewitness Identification in Criminal Cases 26–40; Paul, Identification of Accused Persons, 12 Aust. L. J. 42, 44 (1938); Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 480–481; Frankfurter, The Case of Sacco and Vanzetti 31–32.

of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative. The Court of Appeals, *en banc*, stated, 355 F. 2d, at 735,

> "Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question."

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS is of the view that the deprivation of the right to counsel in the setting of this case should be given retroactive effect as it was in *Gideon* v. *Wainwright*, 372 U. S. 335, and in *Douglas* v. *California*, 372 U. S. 356. And see *Linkletter* v. *Walker*, 381 U. S. 618, 640 (dissenting opinion); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (dissenting opinion).

MR. JUSTICE FORTAS would reverse and remand for a new trial on the ground that the State's reference at trial to the improper hospital identification violated petitioner's Fourteenth Amendment rights and was prejudicial. He would not reach the question of retroactivity of *Wade* and *Gilbert*.

SUPREME COURT OF THE UNITED STATES

No. 254.—October Term, 1966.

Theodore Stovall, Petitioner, v. Wilfred Denno, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1967.]

Mr. Justice White, whom Mr. Justice Harlan and Mr. Justice Stewart join, concurring in the result.

For the reasons stated in my dissenting opinion in *United States* v. *Wade*, — U. S. —, I perceive no constitutional error in the identification procedure to which the petitioner was subjected. I concur in the result and in that portion of the Court's opinion which limits application of the new Sixth Amendment rule.

SUPREME COURT OF THE UNITED STATES

No. 254.—October Term, 1966.

Theodore Stoyall, Petitioner, v. Wilfred Denno, Warden. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1967.]

Mr. Justice Black, dissenting.

In *United States* v. *Wade, ante,* and *Gilbert* v. *California, ante,* the Court holds that lineup identification testimony should be excluded if it was obtained by exhibiting an accused to identifying witnesses before trial in the absence of his counsel. I concurred in those holdings as to out-of-court lineup identification on the ground that the right to counsel is guaranteed in federal courts by the Sixth Amendment and in state courts by the Sixth and Fourteenth Amendments. The first question in this case is whether other defendants, already in prison on such unconstitutional evidence, shall be accorded the benefit of the rule. In this case the Court holds that the petitioner here, convicted on such unconstitutional evidence, must remain in prison, and that besides Wade and Gilbert, who are "chance beneficiaries," no one can invoke the rule except defendants exhibited in lineups in the future. I dissent from that holding. It keeps people serving sentences who were convicted through the use of unconstitutional evidence. This is sought to be justified on the ground that retroactive application of the holding in *Gilbert* and *Wade* would somehow work a "burden on the administration of justice" and would not serve the Court's purpose "to deter law enforcement authorities." It seems to me that to deny this petitioner and others like him the benefit of the new rule deprives

them of a constitutional trial and perpetrates a rank discrimination against them. Once the Court determines what the Constitution says, I do not believe it has the power, by weighing "countervailing interests," to legislate a timetable by which the Constitution's provisions shall become effective. For reasons stated in my dissent in *Linkletter* v. *Walker*, 381 U. S. 618, 640, I would hold that the petitioner here and every other person in jail under convictions based on unconstitutional evidence should be given the advantage of today's newly announced constitutional rules.

The Court goes on, however, to hold that even though its new constitutional rule about the Sixth Amendment's right to counsel cannot help this petitioner, he is nevertheless entitled to a consideration of his claim, "independent of any right to counsel claim," that his identification by one of the victims of the robbery was made under circumstances so "unfair" that he was denied "due process of law" guaranteed by the the Fourteenth Amendment. Although the Court finds petitioner's claim without merit, I dissent from its holding that a general claim of "unfairness" at the lineup is "open to all persons to allege and prove." The term "due process of law" is a direct descendant of Magna Charta's promise of a trial according to the "law of the land" as it has been established by the lawmaking agency, constitutional or legislative. No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended that the Due Process Clause of the Fifth or Fourteenth Amendment was designed to mean any more than that defendants charged with crimes should be entitled to a trial governed by the laws, constitutional and statutory, that are in existence at the time of the commission of the crime and the time of the trial. The concept of due process under which the Court purports to decide this question, however, is that

this Court looks at "the totality of circumstances" of a particular case to determine on its own judgment whether they comport with the Court's notion of decency, fairness, and fundamental justice, and if so, declares they comport with the Constitution, and if not, declares they are forbidden by the Constitution. See, *e. g.*, *Rochin* v. *United States*, 342 U. S. 165. Such a constitutional formula substitutes this Court's judgment of what is right for what the Constitution declares shall be the supreme law of the land. This due process notion proceeds as though our written Constitution, designed to grant limited powers to government, had neutralized its limitations by using the Due Process Clause to authorize this Court to override its written limiting language by substituting the Court's view of what powers the Framers should have granted government. Once again I dissent from any such view of the Constitution. Where accepted, its result is to make this Court not a Constitution-interpreter, but a day-to-day Constitution-maker.

But even if the Due Process Clause could possibly be construed as giving such latitudinal powers to the Court, I would still think the Court goes too far in holding that the courts can look at the particular circumstances of each identification lineup to determine at large whether they are too "suggestive and conducive to irreparable mistaken identification" to be constitutional. That result is to freeze as constitutional or as unconstitutional the circumstances of each case, giving the States and the Federal Government no permanent constitutional standards. It also transfers to this Court power to determine what the Constitution should say, instead of performance of its undoubted constitutional power to determine what the Constitution does say. And the result in this particular case is to put into a constitutional mould a rule of evidence which I think is plainly within the constitutional powers of the States in creating and enforcing

their own criminal laws. I must say with all deference that for this Court to hold that the Due Process Clause gives it power to bar state introduction of lineup testimony on its notion of fairness, not because it violates some specific constitutional prohibition, is an arbitrary, wholly capricious action.

I would not affirm this case but would reverse and remand for consideration of whether the out-of-court lineup identification of petitioner was, under *Chapman* v. *California*, — U. S. —, harmless error. If it was not, petitioner is entitled to a new trial because of a denial of the right to counsel guaranteed by the Sixth Amendment which the Fourteenth Amendment makes obligatory on the States.